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No.——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID PRICE,

Petitioner,

v.

VIKING PENGUIN, INC. and PETER MATTHIESSEN,

Respondents.

WILLIAM STYRON, KURT VONNEGUT, JOHN IRVING, ALFRED KAZIN and SUSAN SONTAG,

Amicus Curiae.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Are defamatory allegations of specific criminal wrongdoing constitutionally protected as "opinion" merely because they relate to matters of public interest on which the author has espoused a particular point of view?

2. Is the repetition of defamatory falsehoods constitutionally protected as "neutral reportage" where the author has admitted that the charges he adopted as his own included rumors from sources which were unknown or which he considered unreliable?

3. At the summary judgment stage in a libel action, is the court allowed to weigh conflicting evidence and resolve material factual disputes in determining whether there is a jury issue on the question of *New York Times v. Sullivan* malice?

4. Is a field agent of the FBI, who is not the agent in charge and has no supervisory or policymaking responsibilities, a "public official" for purposes of the *New York Times v. Sullivan* malice test?

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OPINIONS BELOW

The opinion of the district court (App. B) dated January 13, 1988, is reported at 676 F. Supp. 1501 (D. Minn. 1988). The opinion of the court of appeals (App. A) is reported at 881 F.2d 1426 (8th Cir. 1989).

JURISDICTION

On August 7, 1989, the court of appeals entered an opinion (App. A) affirming the district court's summary judgment for Respondents. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first amendment to the Constitution of the United States, which provides in relevant part that: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

STATEMENT OF THE CASE

This is a libel action, involving the book "In the Spirit of Crazy Horse" ("*Crazy Horse*").[1] *Crazy Horse* purports to chronicle the plight of reservation Indians and focuses on events that occurred on the Pine Ridge Indian Reservation in South Dakota in the 1970's. Plaintiff, David Price, is a rank-and-file FBI agent who was assigned to Pine Ridge during much of the 1970's. Defendants are Peter Matthiessen, the author of *Crazy Horse*, and Viking Penguin, Inc., the publisher.[2]

Plaintiff commenced this action in federal district court based on diversity of citizensnip, pursuant to 28 U.S.C. § 1332. The Complaint alleges that defendants in *Crazy Horse* defamed plaintiff by accusing him, among other things, of suborning perjury, complicity in murder, violating constitutional rights, corruption, and dishonesty. The relevant defamatory passages of *Crazy Horse* are set forth in the Appendix to the opinion of the court of appeals. See App. A, at A-43. The district court granted summary judgment to the defendants, principally on the ground that the defamatory allegations constituted absolutely protected opinion. App. B, at A-63-72. The Court of Appeals for the Eighth Circuit affirmed.

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[1]*Crazy Horse* appears in the Clerk's Record before the court of appeals at Item XLII.

[2]Contrary to its usual practice, the Eighth Circuit added the names of amici curiae to the official caption of its opinion below. *See* App. A. at A-1. Accordingly, petitioner has retained the names of amici curiae below in the caption of this petition.

A. The Decision of the Court of Appeals

In affirming the dismissal of plaintiff's libel claims prior to trial and as a matter of law, the court of appeals articulated and applied a three-pronged legal framework for libel actions against media defendants. The first prong of the Eighth Circuit's legal framework is the "opinion doctrine." The court defined and applied this doctrine to include even verifiably false defamatory charges, including charges of specific criminal wrongdoing. App. A, at A-7-11. The court held that the doctrine is to be applied by the court, not the jury, because it is intended to serve as a check on the jury's presumed "majoritarian bias." *Id.* at A-9. The court held unconstitutional the time-honored common law doctrine of defamation by implication, holding that if a statement is capable of two interpretations, one actionable "fact" and the other protected "opinion," the statement must be read as constitutionally protected opinion. *Id.* The court of appeals specifically held that: "Where core values of the first amendment are implicated, even some false statements of fact must be protected" by the opinion doctrine, and that even charges of criminal wrongdoing are protected as opinion if they "represent the personal view of the author." *Id.* at A-10-11. The court applied these loosely defined opinion standards to dismiss nearly all the defamatory charges, holding, for example, that it was protected opinion to state that the conclusion is "all but inescapable" that plaintiff suborned perjury. App. A at A-23-24.

The second prong of the Eighth Circuit's legal framework is the "neutral reportage" doctrine. Under this doctrine, as applied by the court, an author is absolutely protected when he repeats defamatory charges made by others. *Id.*

at A-12. Those charges can be no more than rumors propagated by unidentified persons or by known criminals whom the author himself disbelieves. Nor does "neutral" reportage, as defined by the Eighth Circuit, require actual neutrality by the author: "evidence of the author's general disposition toward his topic does not establish whether he espoused each particular allegation." *Id.* at A-13. The privilege applies even where, as here, the author advises his reader that he believes there is "great evidence" of criminal conduct by the plaintiff, and proclaims that the plaintiff "would be soiled for the rest of his days" due to that criminal misconduct. *Crazy Horse,* at 472. Thus, the repetition of unreliable rumors, and advocacy that these rumors are true, is absolutely protected by the neutral reportage doctrine as applied by the court of appeals in this case.

The third prong of the Eighth Circuit's legal framework concerns the court's role on summary judgment with respect to the "malice" requirement of *New York Times v. Sullivan,* 376 U.S. 254 (1964). The court of appeals held that in ruling on summary judgment with regard to actual malice, "we make an independent judicial evaluation of the evidence," App. A, at A-14, indicating that, in doing so, it would "not [be] analyzing evidence in [the] light most favorable to the non-mover". *Id.* (citing *Berry v. National Broadcasting Co.,* 480 F.2d 428, 432 (8th Cir. 1973)). As discussed below, even a cursory comparison of the Eighth Circuit's opinion with the record before it shows that the court engaged in factfinding on summary judgment and erroneously construed the disputed facts in the light most favorable to the moving parties, the media defendants. The court of appeals also held that plaintiff was a "public official," even though he was merely a rank and file FBI agent, and that therefore he was subject to the clear and

convincing evidence/actual malice standard articulated in *New York Times.*

B. The Facts Material To This Court's Consideration Of The Questions Presented

1. The Record Before The Court Of Appeals On The Opinion Issue

The book at issue, *Crazy Horse,* is touted by its publisher as "a superb piece of investigative writing." *Crazy Horse,* jacket. C.R., Item XLII.[3] Although it addresses an assortment of topics, its primary focus is on a 1975 shoot-out between Indians and FBI agents at the Pine Ridge Reservation, that culminated in the execution-style murder at close range of two agents, and the death of one Indian. The book focuses on the events leading up to the shoot-out, the shoot-out itself, the subsequent FBI investigation, and the conviction of one Indian, Leonard Peltier, for the murder of the agents.

Crazy Horse is unequivocally presented by the author and publisher as a work of fact. It is classified by the publisher as non-fiction, and is described by the publisher as a book "filled densely with facts." Deposition of Elizabeth Sifton, at 59, 82, C.R. Item LII. The publisher's publicity piece for the book leaves no doubt it is intended as factual: it claims, for example, that "Peter Matthiessen provides disturbing new evidence" of government misconduct in the prosecution of Leonard Peltier. C.R. at 101-102. The book is replete with footnotes.

Although the book discloses the author's sympathy for Leonard Peltier, it does not suggest that sympathy should lead the reader to disregard or discount the book's factual

[3]"C.R." refers to the Clerk's Record before the court of appeals. All documents and facts cited herein were part of the record before the district court and the Eighth Circuit.

assertions. In fact, the converse is true: the message is that the book's allegedly factual materials should lead the reader to share the author's sympathies. Only if those factual allegations are believed to be true by the reader can the book's arguments and conclusions have any force.

The factual allegations in *Crazy Horse* include numerous charges of criminal wrongdoing directed specifically at the plaintiff, David Price. These specific charges are interspersed among generalized accusations of improprieties. By carefully constructing a series of general and specific charges and cleverly qualified allegations, the author conveys unmistakably to the reader that the plaintiff engaged in criminal wrongdoing.

At the general level, the author concludes that there is "great evidence of misconduct" by the plaintiff, and declares that the plaintiff "would be soiled for the rest of his days by deeds done in the belief that the end justified the means, whether or not he ever pays a formal penalty." *Crazy Horse*, at 472. As the Eighth Circuit notes, the author does state that the plaintiff is "regarded wrongly as the villain of the tale. . . ." *Id.* However, contrary to the Eighth Circuit's indication, this is not an exoneration of the plaintiff, but rather is part of a broader attack on his employer that again reaffirms the author's charge of wrongdoing by plaintiff:

> Zigrossi said he regarded Price as a "model agent." What is alarming here is not that Zigrossi is wrong but that he is right; according to the value system of the FBI, Price is indeed a "model agent". . . . What these men did right is precisely what is wrong with the FBI, and with the Justice Department, and with a government of quick stepping bureaucrats and politicians for whom truthfulness and integrity have been

> reduced to an aspect of public relations. As Dick Marshall says, "The government won't obey the laws its own Congress enacted. . . ."

Id. at 474.

These general accusations charging plaintiff with active participation in an alleged broadranging pattern of governmental misconduct provide the backdrop against which the author also charges plaintiff with particularized wrongdoing. Plaintiff is accused of suborning perjury with respect to witnesses Louis Moves Camp and Myrtle Poor Bear, complicity in the murder of Anna Mae Aquash, illegal surveillance and harassment of American Indians, corruption, and dishonesty. App. A, at A-43. Although some of the accusations bear apparent qualifiers, they all nonetheless convey the intended message that plaintiff likely engaged in criminal wrongdoing. For example, with respect to the alleged perjurious testimony of Louis Moves Camp, the author states:

> More serious than Louis Moves Camp's lies was the all but inescapable conclusion that Agent Price and perhaps Agent Williams had knowingly prepared this man to give false testimony; at the very least they found his story so convenient that they had not bothered to find out if it was true.

Crazy Horse, at 98. This allegation was preceded by a description of plaintiff's alleged involvement in the preparation of Moves Camp's testimony (*Crazy Horse*, at 93-97), much of which is factually wrong, and which was documented to be wrong in response to defendant's summary judgment motion. *See* Affidavit of David Price, ¶¶ 11-12, C.R. Item LVI; Second Affidavit of David Price, ¶¶ 7-8, C.R. Item XXXVII.

Another example relates to the murder of Anna Mae

Aquash, and the alleged coverup of that murder. Again the author misstates plaintiff's involvement in the FBI investigation of that murder. For example, he erroneously places plaintiff at the scene when the body was found, and misstates a number of other aspects of plaintiff's alleged involvement, all designed to convey falsely to the reader that the plaintiff knew more and did more than was actually the case. *Crazy Horse*, at 229, 260-67; Affidavit of David Price, ¶¶ 48, 52-58, C.R. Item LVI. The author then falsely accuses the FBI of not investigating the murder, "because they thought it would lead them somewhere that they didn't want to go." *Crazy Horse*, at 264. He relates allegations that someone affiliated with the FBI killed Ms. Aquash in retaliation for the murders of the two agents. *Id.* at 267. He falsely accuses plaintiff of later threatening a reluctant witness in another case "that failure to cooperate might bring down upon this witness the same fate that befell Anna Mae Aquash, who certainly failed to cooperate as well." *Id.* at 265. The author then states that "[i]nevitably, local suspicion focused on David Price" as the murderer of Ms. Aquash, without saying why that was inevitable, and also states that plaintiff was the person "whom some of the Indians, at least, had suspected of involvement in the killing. . . ." *Id.* at 267. Having related these obviously defamatory accusations, the author issues an apparent caveat: "no one I have talked to makes the serious claim that David Price killed Anna Mae Aquash; . . ." *Id.* at 446. While in isolation this would appear to be an exoneration of plaintiff, in context it is merely a prelude to the allegation that plaintiff may nonetheless have masterminded the murder. Immediately after the quoted passage there appears the following:

> ; all seem to agree that whoever was responsible for the death, it was an Indian who pulled the trigger. It is sometimes said that Lakota medicine men, making their own Indian-way investigations, had received the message in the sweat lodge: an Indian had killed Anna Mae at the direction of two white men, and sooner or later the names of the killers would come out. As Red Cloud remarked of Spotted Tail's death, ". . . an Indian did it. But who set on the Indian?"

Id.

As these examples indicate, the author's methodology for many of the accusations was to build a case against plaintiff based on erroneous facts, accuse plaintiff of criminal wrongdoing (either directly or by quoting alleged statements of third persons), and then, for certain of the charges, include at some point in the book a caveat that recognized no more than the possibility that plaintiff might not ultimately be proven guilty as charged. Thus, this case squarely presents the issue whether charges of serious criminal wrongdoing, made in a book purporting to present facts, can be absolutely protected as opinion merely because the author acknowledges he has a point of view and qualifies certain of the charges so the reader will conclude "only" that the plaintiff likely, probably, or may have committed the criminal acts at issue.

2. The Record Before The Court Of Appeals On The Neutral Reportage Issue

The court of appeals also justified dismissal on the theory that the author merely republished charges made by others, holding that republication is absolutely protected by the first amendment. In *Crazy Horse*, serious, defamatory charges frequently are not attributed to anyone at all: for example, the charge that "[i]nevitably local suspicion

focused on David Price" as the murderer of Anna Mae Aquash is unattributed. *Crazy Horse*, at 267. In discovery, the author could not identify his source for this and numerous other assertions about plaintiff in *Crazy Horse*. Deposition of Peter Matthiessen ("Matthiessen Deposition"), C.R. Item Nos. LIV, LV. Other charges are attributed to persons admitted by the author to be unreliable. Matthiessen Deposition at 125, 234-35, 244, 316-17, C.R. Item No. LIII. For example, the author quotes the charge by Kenneth Tilsen that plaintiff "is one of the most corrupt and vicious agents in the FBI . . ." (*Crazy Horse*, at 461), while admitting in his deposition that he did not consider Tilsen a reliable source. Matthiessen Deposition, at 125, C.R. Item No. LIII.

The author also espouses the allegations made against plaintiff. He concludes there was "great evidence" of plaintiff's misconduct, and unequivocally states that plaintiff "would be soiled for the rest of his days" because of his misdeeds, "whether or not he ever pays a formal penalty." *Crazy Horse*, at 472. In his deposition, the author admitted the misdeeds referred to in this passage were the various specific charges of criminal wrongdoing against plaintiff contained in *Crazy Horse*. Matthiessen Deposition, at 149-59, C.R. Item No. LIII. Thus, this case squarely raises the issue whether the neutral reportage doctrine absolutely protects an author who republishes unsubstantiated rumors and speculation of criminal wrongdoing, from unreliable sources, and who personally espouses those charges.

With respect to this issue, one might get the impression from the opinion of the Eighth Circuit that all the author did was repeat accusations contained in court records, frequently accusations from judges and prosecutors. This is not an accurate reflection of the record, for a number of rea-

sons. First, many of the serious defamatory charges are not found in any court records. Examples include the Anna Mae Aquash murder, the corrupation allegation, and the charges of illegal surveillance. These defamatory allegations alone are more than sufficient to support a libel action, and they are unaffected by defendants' (and the Eighth Circuit's) reliance, frequently erroneous, on court records and pronouncements of judges and prosecutors. Second, frequently the court records at issue are misrepresented or distorted by the author. *See* First Affidavit of Patricia A. Guthmann, C.R. Item No. XXXIV. Finally, those records frequently contain allegations of government misconduct that the author, and, inexplicably, the Eighth Circuit, erroneously attributed to the plaintiff. For example, plaintiff was not involved in the decision to withhold one of the Myrtle Poor Bear's affidavits from Canadian officials in conjunction with the Leonard Peltier extradition proceedings, nor did plaintiff "produce" the allegedly perjurious Louis Moves Camp or prepare his testimony. First Affidavit of Patricia A. Guthmann, Exhibits M, and R, C.R. Item No. XXXIV; Matthiessen Deposition at 831, C.R. Item No. LIV; Affidavit of David Price, ¶ 12, C.R. Item No. LVI. In sum, the author does much more than simply reiterate dafamatory charges contained in court records.

3. The Record Before The Court Of Appeals On The *New York Times* Malice Issue

The court of appeals ruled that on summary judgment, it was required to engage in an "independent judicial evaluation of the evidence" on the malice issue, that this allowed the court to weigh conflicting evidence, and that it would do so in the light most favorable to the media defendants. App. A, at A-14.

There are numerous examples of the court of appeals resolving factual disputes. In finding against plaintiff on malice, for example, the court failed even to mention the direct admission of malice by the author himself. In his deposition, the author was asked about each of the specific charges of criminal conduct made against plaintiff in *Crazy Horse*. He was asked whether he personally had any doubts as to the truthfulness of those charges. His testimony was that he considered the charges to be "rumors", and that he personally did not give "credence" to the charges but merely wrote what he was told. Matthiessen Deposition, at 158-159, C.R. Item No. LIII. The court of appeals, inexplicably, failed even to discuss this almost unprecedented direct evidence of malice in ruling against the plaintiff.

The court also ignored or refused to credit substantial circumstantial evidence of malice. For example, the author entered into a secret arrangement with Leonard Peltier and his lawyers, an arrangement he denied in his deposition until confronted with documentary proof. Matthiessen Deposition, at 146-48, C.R. Item No. LIII. Under that arrangement, the author paid one-half of his royalties to Peltier and his defense team in exchange for exclusive access to Peltier. Affidavit of Daniel P. O'Keefe, Exhibits A and B, C.R. at 105-19. In effect, the author and Peltier were a team. This secret arrangement was never disclosed to the readers of *Crazy Horse*.

Another example of circumstantial evidence ignored by the court of appeals relates to the charge in *Crazy Horse* that the plaintiff threatened an unidentified witness with the same fate that befell the murdered Anna Mae Aquash, if the witness did not cooperate. *Crazy Horse* at 265. The author obviously intended the reader to believe plaintiff committed a number of crimes here (civil rights violations, coercion,

terroristic threats, assault); the reader also would catch the innuendo that the plaintiff was involved in engineering the fate of Ms. Aquash. The undisclosed witness, however, turns out to be Myrtle Poor Bear (Matthiessen Deposition, at 456-57), whom the author eleswhere claims is so obviously mentally incompetent that no person could rely on her assertions in good faith. *Crazy Horse*, at 453. Knowing this, the explanation of why the witness's identity was not disclosed to the reader becomes obvious. This example sheds substantial light on the author's reckless state of mind.

In addition to simply ignoring evidence of malice, the court's opinion also is replete with examples of judicial fact-finding on disputed facts. For example, the court of appeals held that plaintiff must have known of Myrtle Poor Bear's alleged incompetence because of his acquaintance with Ms. Poor Bear's high school principal (App. A, at A-29), when in fact the principal had told plaintiff that he considered Ms. Poor Bear to be competent. Affidavit of David Price ¶ 7, C.R. Item LVI. In another example, the court ruled that plaintiff had made an insufficient factual showing that he never lived next to Wounded Knee Legal Defense Committee headquarters in Rapid City and Sioux Falls, South Dakota, and therefore never illegally harassed and spied on his alleged neighbors as charged in *Crazy Horse*. The court stated that: "Price is careful to deny the allegations with respect to the month of March, Price Aff. no. 1 at 5, and no events that particularly occurred in March are prominently discussed." App. A, at A-38, n.16. In fact, plaintiff categorically stated in his affidavit that at no time, in March or otherwise, did he ever live next to any Defense Committee headquarters, in either Rapid City or Sioux Falls. Affidavit of David Price, ¶ 10, C.R. Item LVI.

Similarly, concerning the alleged subornation of perjury

with respect to the testimony of Louis Moves Camp, the court ruled that: "Price has not related one thing he or anyone else did to confirm Moves Camp's testimony. Price only denies that nothing was done, failing to refer to any evidence. Price Aff. No. 1 at 7." App. A, at A-25. In fact, plaintiff submitted evidence that he and his partner did not know Moves Camp and were unfamiliar with the events Moves Camp said he had witnessed, and that therefore they were not in a good position to assess his credibility. Consequently, they took him to Minneapolis for debriefing by another agent with 25 years of experience. That agent, together with the prosecuting attorney, prepared Moves Camp for his testimony, not plaintiff and his partner. Affidavit of David Price, ¶ 12, C.R. Item LVI; Second Affidavit of David Price, ¶ 7, C.R. Item XXXVII; First Affidavit of Patricia A. Guthmann, Exhibit R, at 20,671-20,672, C.R. Item No. XXXIV. The court of appeals chose not to credit this evidence, nor the many other examples of malice cited to it.[4]

In sum, it is clear from the record that the court of appeals in fact did what it said it would do: it evaluated the evidence, resolved factual disputes, and chose not to construe the evidence in the light most favorable to the nonmoving party. The court chose not to credit voluminous and wide-ranging evidence of malice, contrary to the proper standard for summary judgment review.

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[4]Indeed, the court of appeals went out of its way to characterize the evidence most favorably to defendants. For example, the court made frequent reference to an interview between plaintiff and the author, suggesting the author had acted fairly in providing plaintiff an opportunity to rebut the defamatory charges. App. A, at A-37. Yet plaintiff by sworn affidavit presented evidence that the author had mischaracterized the interview in *Crazy Horse*, and that in fact plaintiff had not been presented with most of the defamatory charges in that interview. *See* Affidavit of David Price, at ¶ 3, C.R. Item LVI.

REASONS FOR GRANTING THE WRIT

I.

The Legal Framework Constructed By The Court Of Appeals Allows The Courts To Circumvent The Delicate Balance Struck By This Court In *New York Times* And Its Progeny.

Few areas of constitutional litigation raise more intricate yet important balancing issues than libel cases against media defendants. The individual's reputational rights, long recognized and protected by the common law, are pitted against the need to encourage open and robust discussion of public issues. This Court struck the balance between these competing interests in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), where the Court found the first amendment interests to be paramount in cases brought by public officials, except where defamatory allegations are published with knowledge of falsity or with a reckless disregard for the truth. In the 25 years since *New York Times*, however, various legal doctrines have developed among the lower courts that substantially alter the balance struck by this Court. Of particular significance are the doctrines of opinion and neutral reportage.

In the present case, the court of appeals weaved the doctrines of opinion and neutral reportage together with a misapplication of this Court's *New York Times* malice doctrine to create an insurmountable hurdle for plaintiffs in media libel cases. Any author with even a modicum of cleverness can publish purposefully false allegations of criminal wrongdoing, yet be absolutely protected and never have to face a jury. If an author discloses in a footnote at the end of the book that he is biased, or includes clever and meaningless qualifiers to his defamatory allegations (for example: the conclusion is "all but inescapable" that plaintiff suborned perjury), he is absolutely protected by the opinion doctrine.

If the author places the defamatory charges in the mouth of an unidentified or admittedly unreliable third person, he can then espouse and adopt those charges (plaintiff will be "soiled for the rest of his days" due to his misdeeds) and nonetheless be absolutely protected by the neutral reportage doctrine. And if any statements fall in the cracks between opinion and neutral reportage — if indeed, there are any cracks between those doctrines as they were articulated and applied below — the court under the framework developed by the Eighth Circuit can weigh the evidence of *New York Times* malice, resolve factual disputes, and choose to credit the author's version of the evidence. Thus, ironically, the author's biases or point of view protect his defamatory charges as "opinion," but do not count against him with respect to the neutral reportage or malice doctrines.

Under the loosely defined legal standards enunciated by the Eighth Circuit, it should be obvious that a court has almost unfettered discretion to dismiss a libel action on summary judgment. It should be equally obvious that these standards are at odds with the principles enunciated by this Court in *New York Times* and its progeny.

II.

Where Statements Are Precise And Verifiable, Allege Specific Criminal Misconduct, And Are Understood As Factual Allegation Rather Than Hyperbole, Protecting Those Statements As "Opinion" Is Contrary To The Principles Established By This Court.

As the court of appeals analyzed the opinion issue, a statement that is verifiably false, and made with *New York Times* malice, may nevertheless be constitutionally protected as "opinion." This analysis is contrary to this Court's approach to defamation and imposes a major hurdle where none should exist.

A. A Separate Opinion Defense Is Contrary To The Prior Decisions Of This Court, Destroys The Balance Between Free Speech And Reputational Interests Crafted By This Court, And Is Doctrinally Impractical And Unsound.

In *New York Times* and in subsequent cases, this Court established that there are constitutional limitations on the power of state law to impose liability for defamation, and that "actual malice" is the principal constitutional limitation on defamation actions brought by public officials. At the same time, this Court has rejected the "absolutist" view that a media defendant can never be held liable for defaming a public figure. Instead, the right to free speech must be balanced by the individual's right to protection of his good name. *See, e.g. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). This balance, the Court held in *Gertz*, is achieved by the *New York Times* malice standard:

> This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehoods. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.

Id. at 342.

Despite this clear precedent, many courts of appeals, including the court of appeals in this case, have relied on dicta from *Gertz* to place an additional constitutional barrier between a victim of defamation and his recovery. "A passage from Justice Powell's opinion for the court in *Gertz* . . . has become the opening salvo in all arguments for protection from defamation actions on the ground of

opinion, even though the case did not remotely concern the question." *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61 (2nd Cir. 1980) (Kaufman, J.) That passage says, in introducing "the common ground" of defamation law:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

418 U.S. at 339-340.

There can be little doubt that in reviewing "the common ground", in a case completely unrelated to the distinction of fact and opinion, this Court did not intend to create a significant new threshold test in the defamation area. As Chief Justice Rehnquist has recognized:

> At the time I joined the opinion in *Gertz, supra*, I regarded this statement as an expression of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense, and that the test of truth for political ideas is indeed the marketplace and not the courtroom. I continue to believe that is the correct meaning of the quoted passage. But it is apparent from the cases cited by petitioner that lower courts have seized upon the word "opinion" in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious "of the rich and complex history of the struggle of the common law to deal with this problem."

Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting from denial of certiorari) (citation omitted).

In light of *New York Times* and its progeny, *Gertz* simply stated a common sense truism. The tort of defamation is based on false statements. To be false, a statement must purport to be factual. It must be sufficiently specific and verifiable to be capable of being deemed true or false, and must be understood by the reader as stating factual matter rather than satire or hyperbole. That simple principle, however, has been transmogrified by various courts of appeals into elaborate three and four-prong tests in such decisions as *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980) and *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc.), *cert denied*, 471 U.S. 1127 (1985).

The elaborate frameworks created in these cases for segregating fact from opinion are unnecessary in light of principles already articulated by this Court. The concern that statements be actionable only when sufficiently specific and verifiable to be understood as factual is addressed by this Court's holding that a plaintiff must affirmatively prove the falsity of statements at issue, reversing the common law presumption of falsity. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). If a statement is not sufficiently specific to be verifiably false, then the plaintiff cannot meet his burden of proving falsity. *Id.* at 776.[5]

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[5]An article anticipating the *Hepps* holding discussed the implications of *Hepps* on the fact/opinion distinction:

> Perhaps the most important consequence of requiring the plaintiff to prove the falsity of the statement is that the courts now can discard permanently the distinction between fact and opinion.
>
> * * *
>
> [B]y shifting the burden of proof on the issue of the statement's falsity to the plaintiff, these statements that cannot be disproved [are] absolutely . . . privileged.

Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 869 874 (1984). *See also Ollman v. Evans, supra*, 750 F.2d at 1037 (Scalia, J., dissenting).

In light of *Hepps*, a separate "opinion" defense is unnecessary as a means of distinguishing verifiably factual from nonfactual statements.

This Court has also held that, to be actionable, statements must be understood by the average reader as stating facts, rather than rhetorical hyperbole or satire. *See Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970) (charge of "blackmail" meant and understood as "rhetorical hyperbole"); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (term "traitors" as used with respect to "scabs" in labor disputes not meant literally). A separate "opinion" defense adds nothing here, either.

That the various formulations of the "opinion" defense developed by the courts of appeals are superfluous, however, does not make them harmless. Rather, because the fact/opinion distinction borders on the metaphysical, they provide a virtually impenetrable shield for clever defamers who would otherwise run afoul of this Court's test of false defamatory assertions made with actual malice. As the Seventh Circuit recently recognized:

> Ever since [*Gertz*], courts have wrestled with the question "what's an opinion?" and have come up with buckets full of factors to consider but no useful guidance on what to do when they look in opposite directions, as they always do. This is hardly a satisfactory state of affairs . . . Every statement of opinion contains or implies some proposition of fact, just as every statement of fact has or implies an evaluative component.

Stevens v. Tillman, 855 F.2d 394, 398 (7th Cir. 1988) (Easterbrook, J.), *cert. denied*, 109 S. Ct. 1339 (1989).

See Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L.Rev. 825.

876-77 (1984). Even the courts applying a separate "opinion" defense recognize its problematical nature. *See Ollman v. Evans*, 750 F.2d at 978; *McCabe v. Rattiner*, 814 F.2d 839, 841 (1st Cir. 1987). Yet many courts of appeals rely heavily on the fact/opinion distinction as a separate defense in analyzing media defamation cases. *See, e.g., Price*, App. A; *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987); *McCabe v. Rattiner, supra; Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983).

In so doing, these courts not only apply a standard that yields unpredictable results, they tamper with the balance between judge and jury established by this Court in *New York Times*. Courts applying an opinion defense generally do so as a matter of law. *See, e.g., Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 n.7 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986) (*"Janklow II"*); *Ollman*, 750 F.2d at 978; *Lewis v. Time, Inc.*, 710 F.2d at 553. On the other hand, this Court holds that *New York Times* malice is a jury issue, *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498 (1984); *Herbert v. Lando*, 441 U.S 153, 170 (1979) (referring to actual malice as "ultimate fact"), although subject to the judicial scrutiny articulated in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

By interposing the unpredictable fact/opinion distinction between a defamation claim and the standards applied by this Court, the lower courts reserve to themselves the discretion to dismiss actions without even considering the issues of falsity and actual malice. If the lower courts are to approach defamation cases according to the principles established by this Court, they must be required to abandon a separate defense based on the distinguishing of fact from opinion.

B. Even If A Separate Opinion Defense Should Be Preserved, The Fact/Opinion Distinction As Applied By The Court Of Appeals In This Case Differs From That Applied By Other Circuits And Significantly Alters The Balance Between Free Speech And Reputational Interests Crafted By This Court.

Even if the opinion defense is properly a separate part of defamation law, the court of appeals here put an additional dangerous twist on the fact/opinion distinction. As discussed above, the purpose of the distinction, to the extent any legitimate purpose exists, is simply to require that allegedly defamatory statements be sufficiently precise and verifiable to be provably true or false, and not meant as hyperbole or satire. A court applying the distinction need not also determine whether a public figure is involved, or whether the subject is one of public concern, because no opinion is actionable, regardless of the subject or of the plaintiff's status. *See Ollman*, 750 F.2d at 975; *Lewis v. Time, Inc.*, 710 F.2d at 555.

Nevertheless, the Eighth Circuit in *Janklow II* held that "when determining initially whether a statement is fact or opinion, it does a disservice to the first amendment not to consider the public or political arena in which the statement is made and whether the statement implicates core values of the First Amendment." *Janklow II*, 788 F.2d at 1303, citing *Ollman*, 750 F.2d at 1002-1005 (Bork, J., concurring).

The court of appeals in this case followed *Janklow II* and the *Ollman* concurrence, holding that "where core values of the First Amendment are implicated, even some false statements of fact must be protected." App. A, at A-10. To hold that *false statements of fact* must sometimes be protected *as opinion* is "to indulge in Humpty-Dumpty's use of lan-

guage", to say the least. *See Cianci*, 639 F.2d at 64 (Friendly, J.).

As Judge (now Justice) Scalia recognized, in dissenting in part in *Ollman*, the interpretation proposed by Judge Bork and applied by the court of appeals here fundamentally diverges from the *New York Times* malice standards, long established as the means by which this Court balances the core values of the first amendment with competing reputational interests:

> It is difficult to see what valid concern remains that has not already been addressed by first amendment doctrine that therefore requires some constitutional evolving — unless it be, quite plainly, the concern that political publicists, even with full knowledge of the falsity or recklessness of what they say, should be able to destroy private reputations at will.

Ollman, 750 F.2d at 1037 (Scalia, J., dissenting in part). *See also Janklow II*, 788 F.2d 1307 (Bowman, J., dissenting)[6]

The court of appeals in this case held that false statements of fact involving a public issue may be protected as opinion without regard to whether the statements were made with *New York Times* malice. App. A, at A-10. Such a holding is directly at odds with 25 years of unwavering Supreme Court precedent. The principle enumerated in Judge Bork's *Ollman* concurrence, and applied by the court of appeals in this case, grants license to the lower courts, acting under the rubric "opinion," to apply the absolutist view of the first amendment consistently rejected by this Court.

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[6]The Eighth Circuit also diverged from other courts in its willingness to allow qualifiers to excuse otherwise actionable criminal charges. *See* App. A at A-23. Other courts have recognized the opinion doctrine is inapplicable, even if words of apparency or other qualifiers are used in conjunction with those charges. *See, e.g., Ollman*, 750 F.2d at 980, 983; *Cianci*, 639 F.2d at 63-64.

III.

The Neutral Reportage Doctrine Applied By The Court Of Appeals In This Case Is Contrary To Other Appellate Authority And At Odds With Principles Enunciated By This Court.

The court of appeals in this case based its affirmance in part on the constitution privilege of "neutral reporting." App. A, at A-12, created in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2nd Cir.), *cert. denied sub. nom., Edwards v. New York Times Co.*, 434 U.S. 1002 (1977). The *Edwards* court treated as privileged the republication of (1) serious charges against a (2) public figure (3) published originally by a responsible and prominent organization (4) which were reported by defendant accurately and (5) disinterestedly. *Edwards, supra*, 556 F.2d at 120. The privilege created in *Edwards* altered the common law rule that one who repeats a defamatory statement is as liable for the defamation as the original source. *See, e.g.*, W. Prosser, *The Law of Torts* § 113, at 799 (5th ed., 1984); *Restatement (Second) of Torts* § 578.

The Second Circuit revisited neutral reportage three years later in *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 67-70 (2nd Cir. 1980). In *Cianci*, the Second Circuit demonstrated its intention to apply *Edwards* narrowly, finding the privilege inapplicable because the defendants had espoused the republished allegations, had failed to reveal facts undermining the credibility of certain figures central to the allegations, and had presented the allegations in a misleading way. *Id.* at 69. The court stressed the necessity of limiting the privilege:

> The need for the careful limitation of a constitutional privilege for fair reportage is demonstrated by the breadth of that defense, which confers immunity even

> for publishing statements believed to be untrue. Absent the qualifications set forth by Chief Judge Kaufman in *Edwards*, all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks, at least upon any public official or figure, based on episodes long in the past and made by persons known to be of scant reliability.

Cianci, 639 F.2d at 69-70.

Since its genesis in the Second Circuit, the neutral reportage privilege has met with mixed reviews elsewhere. In dicta, the Third Circuit in *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1225 (3rd Cir. 1978) flatly rejected such a privilege as contrary to this Court's ruling in *St. Amant v. Thompson*, 390 U.S. 727 (1968), that publishing with serious doubt as to the truth of the publication demonstrates actual malice. Accord *Lee v. Dong-A Ilbo*, 849 F.2d 876 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 1343 (1989).

The Eighth Circuit, in *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985) ("*Janklow I*"), in *Janklow II*, 788 F.2d at 1301, n.2, and in this case, not only adopted the privilege created in *Edwards* but expanded on it considerably. The Eighth Circuit discarded the strict application of the five factors enumerated in *Edwards*, and applied the neutral reportage privilege to publications that clearly were not neutral or based on reliable sources. In *Janklow II*, for instance, the privilege was applied to a magazine article that was "transparently pro-Banks." 788 F.2d at 1304. Similarly, in this case the court of appeals stated that "we focus on whether the reports were accurate reflections of what was said or done. Evidence of the author's general disposition toward his topic does not establish whether he espoused each particular allegation." App. A. at A-13.

The court of appeals applied this standard to find that Matthiessen did not espouse the defamatory statements he republished. The court's finding disregarded the fact that Matthiessen was anything but neutral, as demonstrated by his contract with Peltier's defense committee and by conclusory statements in the book similar to those found to constitute espousal in *Cianci*. In *Crazy Horse*, Matthiessen refers to Price as a person "for whom truthfulness and integrity have been reduced to an aspect of public relations;" he states that Price "would be soiled for the rest of his days by deeds done in the belief that the end justified the means, whether or not he ever pays a formal penalty;" he accuses Price of "producing the perjurious witness Louis Moves Camp;" concerning the Aquash murder allegations, he observes that "every circumstance seems to bear out" the allegation of Price's complicity. *See Crazy Horse* at 263, 276, 472, 474.

The courts of appeals, then, have offered at least three discernable views of neutral reportage; the narrow Second Circuit privilege, the broader Eighth Circuit privilege, and the hesitancy of the Third and Fourth Circuits to adopt any such privilege at all. Additionally, lower courts and commentators have provided a broad spectrum of neutral reportage analysis, all stemming from the Second Circuit's decision in *Edwards*. A good summary of this ever-expanding morass is provided in *DiSalle v. P.G. Publishing Co.*, 375 Pa. Super. 510, 544 A.2d 1345 (Pa. Super 1988), *appeal denied*, 557 A.2d 724 (Pa.), *cert denied*, 109 S.Ct. 3216 (1989).

This cacophony of conflicting views is not surprising. The *Edwards* opinion provided little in the way of constitutional underpinnings for the privilege it created. *See, e.g.*,

DiSalle, 544 A.2d at 1358 ("we are troubled by this formulation, however, because of the apparent absence of a constitutional foundation for this purported First Amendment protection"); Note, *The Developing Privilege of Neutral Reportage*, 69 Va. L. Rev. 853, 863 (1983) (same).

This Court has not addressed the neutral reportage issue in the twelve years since it was created in *Edwards*. The time is ripe for this Court to resolve this issue, and thereby ensure uniformity in the decisions of the courts of appeals and the other federal and state courts.

IV.

The Court Of Appeals' Malice Holding Was Reached By Applying An Improper Standard And Disregards Considerable Evidence Of Actual Malice.

It is apparent from reading the Eighth Circuit's opinion in this case that its *New York Times* malice discussion is something of an afterthought, designed to justify dismissal of those few statements arguably not encompassed by its opinion and neutral reportage holdings. The engine that drove the court's ruling clearly was opinion/neutral reportage, not malice. Nonetheless, the Eighth Circuit committed a clear error of law in determining the court's function on summary judgment in libel actions, an error that requires correction by this Court.

The court of appeals in this case ruled that plaintiff, though only a low level FBI agent, was a public official and therefore must satisfy the *New York Times* actual malice standard. The court also held that it was required to conduct "an independent judicial evaluation of the evidence" to determine if actual malice had been established. App. A, at A-14. This "independent evaluation," the court ruled, did "not" require it to analyze the evidence "in [the]

light most favorable to the non-mover," contrary to standard summary judgment procedures. *Id.* (citing and summarizing *Berry v. National Broadcasting Co.*, 480 F.2d 428 (8th Cir. 1973)). As described previously, the court of appeals then proceeded to weigh the conflicting evidence, resolve factual disputes favorably to defendants, and hold that the plaintiff had failed to meet his burden under *New York Times*. *See* pp. 11-14, *supra*.

This Court held unequivocally in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that Federal Rule of Civil Procedure 56 works the same in libel cases, *Id.* at 255, as in all other cases: "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249. The only difference is that the evidence, when viewed in the light most favorable to the non-moving party, must present a material factual dispute under the clear and convincing standard applicable to the *New York Times* malice issue. *Id.* at 252-56.

The Eighth Circuit in this case did not apply the standard enunciated in *Anderson v. Liberty Lobby, Inc.* Instead, the court assumed to itself the task of evaluating the evidence and resolving factual disputes, candidly admitting it was doing so, and apparently believing it had the authority and responsibility to do so. Had the court applied the proper standard, and credited plaintiff's sworn testimony and other properly presented evidence, it would not have reached the same result on the malice issue. As previously described, this case involves an almost unprecedented direct admission of malice, as well as detailed, diverse, and voluminous circumstantial evidence of malice. *See* pp. 11-14, *supra*. Under *Liberty Lobby* this evidence must be credited, and when it

is credited it constitutes ample evidence from which a jury could conclude, under the clear and convincing standard, that the defamatory falsities at issue here were published with *New York Times* malice.

The court of appeals also erred in concluding, as a matter of law, that plaintiff is a "public official" for purposes of the *New York Times* malice test. Plaintiff held no supervisory or policymaking position within the FBI during the time period in question. He was a rank-and-file agent, responsible for investigating major crimes on the reservation. *See* Second Affidavit of David Price, Exhibit A, C.R. Item XXXVII (FBI performance evaluation for 1975-1976). It is an open question whether such a low level government employee is a "public official" for purposes of the malice test. This Court has strongly hinted he is not:

> The District Court also concluded that Hutchinson was a "public official." The Court of Appeals did not decide whether that conclusion was correct. We therefore express no opinion on the issue. The Court has not provided precise boundaries for the category of "public official;" it cannot be thought to include all public employees, however.

Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979) (citations omitted). As suggested by *Hutchinson*, the "public official" category should properly be limited to public servants in supervisory or policymaking positions. Rank-and-file employees should be required only to meet the negligence test required of private persons under *Gertz*. See *Gertz*, 418 U.S. at 347. Under the negligence standard, as under the higher malice standard, there is more than ample evidence in this case to require submission to the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 6, 1989

APPENDIX

APPENDIX A

DAVID PRICE,

Appellant,

v.

VIKING PENGUIN, INC. and PETER MATTHIESSEN,

Appellees.

WILLIAM STYRON, KURT VONNEGUT, JOHN IRVING, ALFRED KAZIN and SUSAN SONTAG,

Amicus curiae.

No. 88-5075
United States Court of Appeals,
Eighth Circuit.
Submitted Oct. 19, 1988.
Decided Aug. 7, 1989.

Before HEANEY* and FAGG, Circuit Judges, and HENLEY, Senior Circuit Judge.

HEANEY, Senior Circuit Judge.

David Price, a special agent of the Federal Bureau of Investigation, was assigned to the Pine Ridge Reservation (Reservation) in South Dakota during the early 1970s. While on assignment on the Reservation, he played a role in investigating the Wounded Knee occupation and a shoot-out on the Reservation during which two F.B.I. agents were killed. Leonard Peltier, a member of the American Indian Movement (A.I.M.), was convicted of their killings. Peter Matthiessen, a well-known author, decided to write a book

*The HONORABLE GERALD W. HEANEY assumed senior status on December 31, 1988.

about these events, dividing the profits between himself, the publisher, a film company and the Leonard Peltier Defense Committee. The book, *In the Spirit of Crazy Horse,* is generally sympathetic to Indian views about these incidents and the treatment of Indians by the federal government. The author made a number of statements that Price considered defamatory. Price brought suit for defamation, intentional infliction of emotional distress, false light invasion of privacy, and prima facie tort. He seeks compensatory damages of $25,000,000, punitive damages, costs and fees. In light of the enormity of these claims, Viking withdrew the book from circulation.

Successive rulings by the district court narrowed the dispute to specific defamation claims.[1] The remaining claims involve twenty statements made in *Crazy Horse* and found in the appendix to this opinion. They are divisible into five categories: Price's relation to the perjury of Louis Moves Camp and involvement in seeing that criminal charges against him were dropped; misconduct regarding the testimony and affidavits of Myrtle Poor Bear; the withholding of information or gross negligence regarding the homicide investigation of Anna Mae Aquash; harassment of Indian people; and general statements about Price's character.

Both sides have engaged in extensive and acrimonious discovery surrounding the historical facts and the editorial process. Nearly four years after Price first brought his

[1]*See Price v. Viking Press, Inc.*, 654 F.Supp. 1038 (D.Minn.1987) (dismissing claims against another defendant); *Price v. Viking Press, Inc.*, 625 F.Supp. 641 (D.Minn.1985) (dismissing under state law some defamation claims, emotional distress claim, privacy claim and prima facie tort claim); *see also,* 115 F.R.D. 40 (D.Minn.1987); 115 F.R.D. 43(D.Minn.1987); 113 F.R.D. 585 (D.Minn.1986) (discovery orders). We affirm the district court's dismissals on state law grounds, 625 F.Supp. at 645, respecting the district court's interpretation of state law. *Schuster v. United States News & World Report,* 602 F.2d 850, 854 (8th Cir.1979).

claims, and after legal costs of over one million dollars to the defendants, the district court finally dismissed the remaining defamation claims on constitutional grounds. *Price v. Viking Penguin, Inc.*, 676 F.Supp. 1501 (D.Minn. 1988). Price appeals the district court's judgment regarding his defamation claims and asks us to remand this case for trial by jury. We decline to do so. We begin by setting forth the applicable law.

I.

FREEDOM OF SPEECH AND STATE DEFAMATION LAW

A. The First Amendment

Our founding fathers created a vibrant democracy, relying on virtually unregulated dissension and self-examination to provide our republic with stability and our citizens with satisfaction. In unqualified language applicable to the states, they allowed "no law * * * abridging the freedom of speech, or of the press * * *." U.S. Const. amend. I. This liberty, as much as any other has given us our self-definition. It continues to favorably distinguish the United States from most societies in the world, and it is always the vehicle by which we appreciate the past and deliberate over our future. Though the claims raised in this appeal are particular, our review is influenced throughout by the place even this one dispute occupies in our nation's interest. Our most influential leaders have commented on the importance of the right, as well as on the proper role of judges in protecting it.

> To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citi-

> zens believes to be false and fraught with evil consequence.
>
> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine * * * the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 374-75, 47 S.Ct. 641, 647-48, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Thomas Jefferson once admonished us: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors * * * these are safer corrections than the conscience of a judge." *Id.*, n. 3 (quoting Beard's report in 123 *The Nation* 8 (1926)).

B. Political Speech and First Principles in Defamation Law

State defamation law limits free speech to protect an individual's reputational interests. As the Bill of Rights became applicable to the states, the first amendment became increasingly viewed as a limit on state defamation law. *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), established the modern rule that,

even when the defendant's remarks were both defamatory and false, where the remarks were directed at a public official and related to her official conduct, the plaintiff must also prove by clear and convincing evidence that the false remarks were made with actual malice or reckless disregard for the truth. *Id.* at 279-80, 84 S.Ct. at 725-26.

The motivating factor in the Court's analysis was protection for criticism of public officials and speech regarding issues of political concern. The *New York Times* standard was constructed in light of three truths about public speech. First, false statements would necessarily occur in the course of a vigorous public debate. Second, absent protection for even false statements, destructive self-censorship would result. Third, the legal standards for defamation must protect defendants from the self-censorship imposed by threats of litigation. *Id.* at 271-72, 278-79, 84 S.Ct. at 720-22, 724-26. The Court felt that debate on matters of public concern "should be uninhibited, robust, and wide-open, * * * [though] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270, 84 S.Ct. at 720.[2] The weaker state interest in the reputation of individuals has nevertheless been accommodated; where the plaintiff is not a public figure, a different balance is struck. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77, 106 S.Ct. 1558, 1563-64, 89 L.Ed.2d 783 (1986); *Gertz v. Welch*, 418 U.S. 323, 343-47, 94 S.Ct. 2997, 3008-10, 41 L.Ed.2d 789 (1974).

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[2]Because the views in *Crazy Horse* relate to government conduct, we discuss the first amendment and libel law in this light. We imply no view on extensions beyond the enabling of self-government. *See Time Inc. v. Hill*, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 (1967); *Whitney v. California*, 274 U.S. at 374, 47 S.Ct. at 648 (Brandeis, J., concurring).

Supreme Court decisions have created two threshold issues: first, whether the plaintiff is a public figure, and second, whether the challenged statements are allegations of fact. We begin by considering the plaintiff's status, which determines the applicable law.

C. Price's Status

[1] While Price has argued his case under the *New York Times* standard, he is reluctant to concede that he is a public figure for these purposes. Under the circumstances, however, we do not hesitate in agreeing with the district court that Price was a public figure and that the challenged statements relate to his official conduct. 676 F.Supp. at 1510-11.

Price occupied a prominent role in public affairs within the Reservation. He played a substantial role in the investigation of crimes on the Reservation, including the shoot-out. While he is by no means the principal character in the book or its focus, he was the object of public notoriety over these events, having been singled out for criticism by judges and others. In addition, news accounts and editorials about this event have appeared in a variety of forums and have discussed Price's conduct. *See* Defendants' Exhibits nos. 35-42, 62-64, 69, 95, 96, 116, 118 (Lincoln Nebraska Journal, New York Times, The Palm Beach Post, Minneapolis Star & Tribune, San Antonio Express, Sioux Falls Argus Leader, St. Paul Press & Dispatch, Aberdeen American News, Rapid City Journal, The Los Angeles Daily Journal, People, Twin Cities Reader, Newsweek, The Washington Star, and The Nation). Serious accusations about Price have been directly made in other books. *See* Weyler, *Blood of the Land* (Everest House 1982); Brand, *The Life and Death of Anna Mae Aquash* (Lorimer & Co.

1978). Serious questions about his conduct have been raised by many members of Congress. Congressional Correspondence to the President, Dec. 17, 1980 (Defendants' Exhibit no. 97).

The challenged statements from *Crazy Horse* all concern the discretionary performance of Price's duties. In context, criticism of the actions Price took in his official capacity reflect on the imperatives and conduct of the F.B.I. and the government generally, implicating the type of public debate at the core of the first amendment. We therefore apply the standards set forth in *New York Times. See Rosenblatt v. Baer*, 383 U.S. 75, 85, 86 S.Ct. 669, 675, 15 L.Ed.2d 597 (1966) ("the public official designation applies at the very least to those * * * who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.") *Stevens v. Tillman*, 855 F.2d 394 (7th Cir.1988) (school principal), *cert. denied*, —U.S.—,109 S.Ct. 1339, 103 L.Ed.2d 809 (1989); *Gray v. Udevitz*, 656 F.2d 588 (10th Cir.1981) (police officer).

D. Fact and Opinion

[2] At the outset, we must also consider whether the challenged statements are opinion and therefore absolutely protected. The separation of opinion from fact acts as a limit on government power.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz v. Welch, 418 U.S. at 339-40;[3] *see also Masses Publishing Co. v. Patten*, 244 F.2d 535, 539-40, (S.D.N.Y. 1917) (per Hand, J.). This is a question of law, and we have recently established how we are to proceed. *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.) (en banc) (*Janklow II*) (reversing in part, *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985) (*Janklow I*)), *cert. denied*, 479 U.S. 883 (1986).

[3] In *Janklow II*, we established a four-part framework for distinguishing fact and opinion, drawing on Judge Starr's plurality opinion and the concurring opinion of Judge Bork in *Ollman v. Evans*, *supra* note 3. The four criteria are tools to help us determine from the totality of circumstances whether the first amendment protects a statement sufficiently that resort to the jury is unnecessary; they are: the specificity of the statement, its verifiability, the literary context and the work's public context. This enterprise is only superficially linguistic. Ultimately, we must decide — not whether a statement in isolation is by virtue of its phrasing factual — but rather whether, when taken in context, the statement functions and would be understood as an unqualified assertion of fact rather than as an element of an opinion. *Id.* at 994 (Bork, concurring). In this light, "fact" and "opinion" take on special meanings, and we therefore pause and consider the four factors.

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[3]This oft-cited language was not necessary to the result in *Gertz*. Nevertheless, the distinction between fact and opinion has been accepted as controlling law by a majority of circuits, including this one. *See Ollman v. Evans*, 750 F.2d 970, 975, n. 6 (D.C. Cir. 1984) (en banc) (collecting cases), *cert. denied*, 471 U.S. 1127 (1985). The *Gertz* dictum has been cited with approval by the Supreme Court. *Hustler v. Falwell*, 485 U.S. 46, 99 L.Ed.2d 41, 49 (1988); *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 504 (1984); *Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974).

Specificity

[4, 5] The precision and specificity with which an assertion is made may reflect the extent to which it actually recites specific factual events. Specificity also goes to the singularity of a statement's meaning. Where a statement or phrase is susceptible of more than one meaning, we will not presume either that the phrase means what the plaintiff asserts it does or that it is factual where it can be understood as an opinion. *Letter Carriers, supra* note 3, at 283-84; *Secrist v. Harkin*, 874 F.2d 1244, 1247, 1250 (1989). We do not recognize defamation by implication. *Janklow II*, 788 R.2d at 1304. *Accord Fudge v. Penthouse Intern, Ltd.*, 840 F.2d 1012, 1016 (1st Cir.), *cert. denied*, 102 L.Ed.2d 42 (1988).[4]

Verifiability

[6] Assertions whose elements are unverifiable, including statements regarding motive, are "intrinsically unsuited" to serve as a basis for libel. *Janklow II*, 788 F.2d at 1302, 1304. Where quantification for a general assertion is impossible, allowing any fact-finder to decide its truth or falsity invites the exercising of personal dispositions regarding "the contents of the statement, its author, or its subject." *Ollman*, 750 F.2d at 981; *see also, id.* at 1006-08 (discussion by concurring judges).

Specificity and verifiability thus function as limits on majoritarian bias and government intervention. By examin-

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[4]At the same time, the necessity for specificity to sustain liability does not impose any requirement for communicative specifity to avoid liability. To avoid abridging free exchange, we do not second-guess nor otherwise intrude upon editorial judgments about what to print. Thus, we have held that a state may not impose liability simply because clearer language or the inclusion of additional reports would rule out an objectionable implication. *Janklow II*, 788 F.2d at 1304-06.

ing each statement for "a precise core of meaning for which a consensus of understanding exists," *Ollman*, 750 F.2d at 979, we hope to avoid both liability conditioned on public sentiment, and putting judges and juries in the role of declaring what the "truth" is about disputed social issues.

Literary Context

[7] The third factor to be examined is the condition and tone of the work as a whole. Various considerations include cautionary or qualifying language, language or style which signals opinion, the type of publication, the location of the statement or work within the publication, and the intended audience. For example, the challenged article in *Janklow II* appeared in a magazine, and "the magazine's generally freer style of personal expression and the article's transparently pro-Banks posture would signal the reader to expect a fair amount of opinion." *Id.* In *Ollman*, it was significant that an editorial was challenged. 750 F.2d at 986.

Public Context

[8] Lastly, we consider whether the statements played a role in a public debate. Where core values of the first amendment are implicated, even some false statements of fact must be protected. "[I]t cannot be avoided if the political arena is to remain as vigorous and as robust as the first amendment and the nature of our policy require." *Ollman*, 750 F.2d at 1002 (Bork, concurring). Statements made in the course of a political debate are also more likely to be understood as opinion. *Deupree v. Iliff*, 860 F.2d 300 (8th Cir. 1988); *Koch v. Goldway*, 817 F.2d 507, 508 (9th Cir. 1987) (per Kennedy, J.).

* * *

Judgments about context often determine a statement's proper classification. As a practical matter, every opinion involves implied or asserted facts, and choices about which facts to assert are always evaluative. *Stevens v. Tillman*, 855 F.2d 394, 398 (7th Cir. 1988), *cert. denied*, 103 L.Ed.2d 809 (1989). We must therefore always ultimately focus on the context from which both the dispute and the statements arise, remaining sensitive to our republic's interest in robust debate and the protection of unpopular viewpoints.

Even when a statement is subject to verification, however, it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it. Thus we reject the suggestion, advanced by the plaintiffs in this case, that any "question of fact" which can be decided by a jury can be actionable as defamation. Such a test ignores the underlying purposes of the fact/opinion distinction, and would lead to results that could not be reconciled with the developing case law in other circuits [citing *Janklow* II]. *Potomac Valve & Fitting v. Crawford Fitting*, 829 F.2d 1280, 1288 (4th Cir. 1987).

E. Reckless Disregard and Neutral Reporting

Once a plaintiff establishes that there were false and defamatory statements of fact made concerning him, the conduct of the defendants in preparing the challenged work becomes relevant.[5] A plaintiff may prevail if she can show that the defendant, in making a particular statement, acted with actual malice, reckless disregard for the truth or had

[5]At what pace discovery should proceed in this light is left to the sound discretion of the trial judge. *Herbert v. Lando*, 441 U.S. 153 (1979); *see also*, Justice Powell's concurring opinion, 441 U.S. at 177-180.

a high degree of knowledge of probable falsity. *Herbert v. Lando, supra* note 5, at 156-57.

[9, 10] "Malice" does not refer to ill will. It is instead another name for the other formulations of the standard for culpability, all of which inquire into the defendant's knowledge prior to publication. *Harte-Hanks Communications Inc. v. Connaughton,* 57 U.S. n. 7L.W. 4846, 4849, (June 22, 1989). The primary focus must be on the defendant's attitude toward the truth of the statements, rather than on the defendant's attitude toward the plaintiff. *Id., Herbert v. Lando, supra* note 5, at 199-202 (Stewart, J. dissenting); *Letter Carriers v. Austin, supra* note 3, at 281-82, ("a shorthand expression of the 'knowledge of falsity or reckless disregard of the truth' standard."). We focus on the information within the defendant's possession; a failure to investigate cannot sustain liability unless there was already good reason to doubt the truth of the information in hand. *St. Amant v. Thompson,* 390 U.S. 727, 733 (1968); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 153-54 (1967) (plurality). Thus, no distinction is drawn between hot and cold news. *Barger v. Playboy Enterprises, Inc.,* 564 F. Supp. 1151, 1156 (N.D. Cal. 1983), *aff'd* 732 F.2d 163 (9th Cir.), *cert. denied,* 469 U.S. 853 (1984).

[11] This Court has added to this test the concept of "neutral reporting." We have held that the recitation of official actions or statements by public bodies, if substantially accurate, is protected, even if the implications are harmful. *Janklow I,* 759 F.2d at 649 (preserved by notation of our court in *Janklow II,* 788 F.2d at 1301 n. 2). The privilege protects a journalist who "believes, reasonably and in good faith, that his report accurately conveys the charges made." *Edwards v. National Audubon Society, Inc.,* 556

F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977). It does not protect one who "in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure." *Id.; Cianci v. New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980). In *Cianci*, a magazine published an article accusing the Mayor of Providence of committing rape. The *Cianci* court held that the accusations were factual and declined to apply *Edwards* because the New Times failed to present the other side of the story. 639 F.2d at 69. In *Janklow II*, we distinguished *Cianci* on the first ground, because there the article misrepresented the timing of the events and expressly accused Cianci of obstruction of justice, relying on the erroneous sequencing of events as proof of the charge. *Janklow II*, 788 F.2d at 1305-06. *Janklow II* also refined the neutral reporting test, for we allowed the privilege even though we found that the article was "transparently pro-Banks." *Id.* at 1304. Thus, we focus on whether the reports were accurate reflections of what was said or done. Evidence of the author's general disposition toward his topic does not establish whether he espoused each particular allegation.

F. Summary Judgment

In this case, the district court has granted summary judgment for the defendants after extensive discovery but before trial. To reverse this judgment, we must find that Price could show that precise factual statements were false. *Philadelphia Newspapers*, 475 U.S. at 775.[6] In the event that some of the statements can be proven false, defamatory

[6]The Supreme Court has not decided whether falsity must be shown by a preponderance of the evidence or by clear and convincing evidence. *Harte-Hanks*, 57 U.S.L.W. at 4847, n. 2. We similarly express no view.

and factual, we must finally decide "whether the evidence in the record could support a reasonable jury finding * * * that the plaintiff has shown actual malice by clear and convincing evidence * * *." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). Despite the posture of the case, we make an independent judicial evaluation of the evidence. *Secrist v. Harkin*, 874 F.2d at 1251; *Liberty Lobby, Inc. v. Dow Jones & Co. Inc.*, 838 F.2d 1287, 1293 (D.C. Cir.), *cert. denied*, 102 L.Ed.2d 51 (1988); *Berry v. National Broadcasting Company, Inc.*, 480 F.2d 428, 432 (8th Cir. 1973) (not analyzing evidence in light favorable to the non-mover), *cert. denied*, 418 U.S. 911 (1974). We begin our evaluation of the challenged statements by describing their literary context and the quality of the author's investigation.

II.

CRAZY HORSE

A. Its Contents

Crazy Horse is a long work divided into three parts. The first part surveys the conditions on the Reservation and the rise of A.I.M. The author makes clear from early on that the F.B.I. and the federal government are regarded as villains by some Indians. He writes that heretofore press coverage had been one-sided, *Crazy Horse* at 196-97, and sets out to tell these Indians' side of the dispute. Introductory Note at 557.

The book presents the views of members of A.I.M., that the F.B.I. targeted them for harassment because the F.B.I. associated A.I.M. with communism and other leftist ideologies. The author reviews A.I.M.'s occupation of Wounded Knee in 1973 and the resulting prosecutions of Dennis

Banks and Russell Means. According to the book, Price supervised a witness, Louis Moves Camp, at their trial. Later, Moves Camp's testimony was entirely discredited. Eventually, the book relates, all charges against Means and Banks were dismissed by the trial judge for government misconduct. In dismissing the case, the court criticized the prosecution and the F.B.I. on the record for their conduct with regard to Moves Camp's perjury. *Crazy Horse* at 99 (quoting Judge Nichol directly).

Later chapters in the first part discuss conditions on the Reservation in between the occupation of Wounded Knee and the 1975 shootout. The book details violence on the Reservation, criticizing Bureau of Indian Affairs (B.I.A.) police and the F.B.I. *Crazy Horse* at 132 (quoting Al Trimble, former Superintendent of the B.I.A.).

The second part of *Crazy Horse* begins with two chapters devoted to the 1975 shootout. The first details the incident from the perspective of the Indians who were there. The second describes events as portrayed in the F.B.I.'s records and reports. Matthiessen acknowledges that obtaining a neutral view of events is difficult. "[T]he public had to choose between the propaganda of the authorities and the rhetoric of the A.I.M. spokesman, neither of which gave an accurate account of what had happened." *Crazy Horse* at 195. In sum, two F.B.I. agents went onto the Jumping Bull property on the Reservation. A shootout began during which the agents were wounded. Someone advanced and executed them at close range. The encampment was surrounded, and during subsequent shooting, an Indian was killed.

The rest of the second part of the book concerns itself with the investigation and trials of the suspected killers. The book quotes Reservation Indians, describing the course

of the investigation. These quoted accounts sometimes portray Price as harassing local citizens. *See e.g. Crazy Horse* at 227-29, 243-44, 247. The F.B.I. focused on four suspects in the agents' killings. One was never tried. Two of the suspects, Butler and Robideau, were acquitted of the charges by a jury in Cedar Rapids. Leonard Peltier was convicted in a subsequent trial in Fargo, after extradition from Canada. His conviction was affirmed by this Court. *United States v. Peltier,* 585 F.2d 314 (8th Cir. 1978), *cert. denied,* 440 U.S. 945 (1979). In the extradition proceeding, the government used the now discredited affidavits of Myrtle Poor Bear, a witness supervised by Price. *Crazy Horse* includes the comments of Judge Ross of this Circuit during the oral argument of Peltier's appeal, criticizing the conduct of the F.B.I. in securing Poor Bear's affidavits. *Crazy Horse* at 372. The book also discusses the discovery of the body of a Jane Doe, later known to be Anna Mae Aquash, an A.I.M. member whose murder remains unsolved. Price is criticized with respect to the investigation of her death.

The third part concerns the post-conviction incarceration of Leonard Peltier and returns to consider at greater length earlier themes regarding the economic condition of the Indian people. It includes interviews with the three men tried for the murders, Peltier, Butler and Robideau. Finally, the book argues for a new trial for Peltier based on government misconduct and using documents obtained under the Freedom of Information Act. Peltier's subsequent appeal based on these documents was denied by a district court, and we affirmed. *United States v. Peltier,* 800 F.2d 772 (8th Cir. 1986) (per Heaney, J., denying a new trial), *cert. denied,* 98 L.Ed.2d 46 (1987).

B. Preparation

Peter Matthiessen has written at least eighteen other books, one of which received the National Book Award in 1978. Matthiessen's preparation was extensive, as the number of documents in the exhibits demonstrate. Primary sources included court transcripts, court decisions, F.B.I. records, congressional investigations, legislative resolutions, books, articles and personal interviews. The text and footnotes in the book explain the background and sympathies of quoted sources. *See, e.g., Crazy Horse* at 459-60. He also consulted with journalists of varying dispositions, and examined the fruits of their investigations. Matthiessen Affidavit at 7-8 (April 21, 1987). In addition, Matthiessen lists other sometimes conflicting sources for information about the same events. *Crazy Horse* at 577-79.

Though there was disagreement over the author's economic explanation of government policies, no one Matthiessen circulated the manuscript to indicated that any statements regarding Price were inaccurate. Moreover, Matthiessen indicates that he excluded from his manuscript unfavorable information about Price that he discredited. Matthiessen Affidavit at 9, 172. The author explained his one-sided selection of material to the reader:

> Although this book argues and supports the cause of the traditional Indian people and their allies and their long-struggle with U.S. Government, I originally wished it to include as many views as possible on both sides of the question. I discovered, however, that federal judges, prosecutors, and law enforcement personnel are rarely willing to comment on a case that is still being contested; also, their essential views

> are everywhere throughout the text, in field reports, memos, trial transcripts, court rulings, and many other documents, and any attempt to balance the argument with "official" comment would sink an already long book under the weight of rhetoric and repetition.

Crazy Horse at 577; *see e.g. id.* at 497-98 (unsuccessful attempts to interview the United States Attorney).

C. Tone

Books can be written in a variety of styles, often telling stories or asserting viewpoints. *Crazy Horse* does both, mixing legends, news accounts and social criticism with the retelling of personal interviews. It is dedicated "for all who honor and defend those people who still seek to live in the wisdom of Indian way." Many of the events are retold in the words of the participants. The author adopts some of their general preconceptions about others, and Mattheissen reports Indian versions of events. *See e.g., id.* at 250 (pistol whipping), 67-83 (Wounded Knee occupation).

While the author is frank about his sympathies, he also, with regard to nearly every important incident, presents contrary views. Often, even the statements Price challenges are made with cautionary language. *See e.g.*, appendix to this opinion, paragraphs 10(o) ("alleged," "disputed"), 10(i) ("suspicions"), 10(m) ("suggestions"), and 10(s) ("speculations"). Nor does Matthiessen always espouse specific claims.

The author also managed to locate and interview David Price. As Matthiessen explained, "Fairly or not, Price had come to personify the most cynical abuses of the F.B.I.'s regressive attitudes toward Indians, and it seemed important to hear his side of the story." *Crazy Horse* at 460. Once

Price began talking, the author "warned him that my sympathies in the Pine Ridge confrontation lay with the traditional Indians. 'The Indian situation *deserves* sympathy,' Price assured me, reverting to a soft and thoughtful tone, 'but it's hopeless. All the F.B.I. was trying to do was to stop the Indians out there from killing each other.' " *Id.* at 462. Price repeatedly indicated that he knew that he was blamed for a lot of bad acts, and that his reputation had already been spoiled. *Id.* at 461 ("I got worked over extremely heavily to say the least * * * I've just had too many ringers thrown at me."), 465 (Don't take it from me, because I'm supposed to be this heinous villain. . . ."), 470 ("Without the allegations, I would be nobody.").

Price also took the opportunity to level allegations of his own. He accused A.I.M. of planning the ambush to get press attention. He said he thought the planner was not an Indian but would not name names. *Id.* at 467. He suggested that a particular Indian was involved in or had knowledge of Anna Mae Aquash's murder. *Id.* at 469-70. He also criticized the acquittal of Butler and Robideau. *Id.* at 468.

At the end of the conversation, the author concludes the report of the interview with mixed comments about Price:

> To judge from his speech, David Price is not a stupid man, but one whose intelligence is severely limited by preconceptions — either that, or he is a liar who not only believes but is angered and moved by his own lies. Despite his awful sentimentality — about Myrtle Poor Bear, about the idealism of his fellow agents — his outrage about Ron Williams's death is genuine; and he does not whine about his villain's role, but seems to accept it in the line of duty.
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> * * *
>
> [T]his man on the other end of the wire was only another casualty of the new Indian wars, and he would

> be soiled for the rest of his days by deeds done in the belief that the end justified the means * * *.
>
> * * *
>
> [He is also] the man regarded wrongly as the villain of the tale * * *.

Crazy Horse at 471-72. Against this backdrop, we analyze the challenged statements from *Crazy Horse* in topical categories.

III. THE CHALLENGED STATEMENTS

A. Louis Moves Camp

Moves Camp testified for the prosecution against A.I.M. members charged with crimes connected to the occupation of Wounded Knee. *Crazy Horse* at 93-99. The government called Moves Camp as a rebuttal witness who allegedly, quoting a defense attorney, "filled in every gap in the prosecution's case, directly connecting the defendants with the alleged offenses — it was amazing!" *Crazy Horse* at 93. According to the book, Moves Camp also confirmed the government's political theory by testifying that A.I.M. was connected with an international communist conspiracy, saying that agents from Russia, China and Czechoslovakia had attended the first meeting of the A.I.M.-sponsored International Indian Treaty Council. *Id.*

The book alleges that Moves Camp was located by Price. *Id.* at 93-94.[7] The author relates that at trial there was testi-

[7]There is a dispute over whether Price located Moves Camp or whether he came to the FBI. All parties agree that his initial contacts were with Agents Price and Williams. "Louis Moves Camp was contacted in Rapid City, South Dakota, by S.A. David F. Price and Ronald A. Williams. Moves Camp was advised of the official identities of the agents and that they were present at Moves Camp's request." FBI Report, Aug. 5, 1974 (Defendants' Exhibit no. 3); *see also*, Defendants' Exhibits 4, 5, 6.

mony that Price and his partner, Williams, had met daily with Moves Camp from August 5 through August 10. During this time period, the witness completed affidavits, foreshadowing his testimony, that were turned over to the federal prosecutor. The prosecutor requested a lie detector test, and the F.B.I. refused. *Crazy Horse* at 94. The defense eventually impeached Moves Camp by showing that he had not been present at Wounded Knee at the time of some of the events he purported to describe. He had been in California appearing on television and at college campuses. *United States v. Banks*, 383 F. Supp. 389, 394 (D.S.D. 1974), *appeal dismissed*, 513 F.2d 1329 (8th Cir. 1975).

In addition, the book discusses an incident that occurred while Moves Camp was in the agents' custody. One night when the two F.B.I. agents and Moves Camp were staying in Wisconsin, they went out drinking. The F.B.I. agents went to bed, leaving Moves Camp in a bar with a young girl. Moves Camp was detained the next day by the River Falls, Wisconsin, police investigating a rape. In the morning, Price received a phone call and "to quote Ron Williams, 'he indicated it was from some type of law enforcement-related person, but did not specify the individual.' " *Crazy Horse* at 96. According to the book, Price returned to River Falls without Williams, assuring Moves Camp, "Don't worry." No rape charges were filed. The author notes that Price and Williams failed to file standard field reports describing these events. In addition, he argues that the defense established that Price conferred for several hours with the state prosecutor, as well as River Falls police, and Matthiessen alleges that Price made it clear "to his fellow lawmen that Moves Camp was a crucial witness for the prosecution in the Means-Banks trial. . . ." *Id.* at 97. He

also quotes the federal prosecutor, however, to the effect that "he saw no reason to believe that what had happened 'wasn't a consensual act between two adults. I have seen no evidence yet that there was any rape. . . .' " *Id.* The author goes on to exonerate Williams with the phrase, "[He] cannot be implicated in the alleged cover-up of the disputed rape." *Id.* at 97. Matthiessen makes no similar exoneration for Price.[8]

Price alleges that the challenged statements defame him by suggesting that he suborned perjury and that he covered up an alleged crime committed by an important witness. Appellant's Brief at 22-23. At the outset, we must decide whether the challenged statements are specific and verifiable. Price does not dispute that Moves Camp committed perjury, nor that Price and Williams chaperoned, interrogated and helped prepare Moves Camp for trial. *See* Affidavit of David Price at 6-7 (Mar. 30, 1987) (Price Aff. no. 1); Affidavit of David Price at 3 (May 13, 1987) (Price Aff. no. 2); *see also*, Report of Agent Williams (Sept. 30, 1974) (Defendants' Exhibit no. 34); Affidavit of Moves Camp (Aug. 11, 1974) (Defendants' Exhibit no. 16). Price only claims that Moves Camp came to the F.B.I. and that "we did the best we could to attempt to determine whether Moves Camp was telling the truth." Price Aff. no. 1 at 7; Price Aff. no. 2 at 3. In addition, Price says that he had only minimal contact with the Wisconsin prosecutor about the rape charge and did not discuss it with the police. Price Aff. no. 1 at 6-7.

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[8]Paragraph 10(b) of the complaint also reports Moves Camp's allegations that he never committed rape and that the agents tried to frame him. This is immediately followed by the accusation of a defense attorney at the trial that Moves Camp was lying about the rape. *Crazy Horse* at 97.

We begin with Price's challenge to the author's conclusionary statement about Moves Camp's testimony:

> More serious than Louis Move Camp's lies was the all but inescapable conclusion that Agent Price and perhaps Agent Williams had knowingly prepared this man to give false testimony; at the very least, they found his story so convenient that they had not bothered to find out if it was true.

Crazy Horse at 98; complaint, paragraph 10(c). Initially, this statement seems specific and verifiable. On its face, the statement seems to allege that as a historical fact, Price did one of two things. Either he suborned perjury or he failed to investigate.

The second part of the statement, alleging that there was not an adequate investigation, would ordinarily be considered factual, especially in light of its seemingly absolute language -- "not bothered to find out if it was true." In context, however, we feel the second part is an assertion of an opinion. It is a qualitative judgment about the agency's motivation, effort and effectiveness. For this reason, it is unverifiable. Evaluating the agency's effort requires subtle judgments about what steps were required for an adequate investigation. Our conclusion that this statement is opinion is buttressed by the surrounding text omitted from Price's complaint. The next two sentences of *Crazy Horse* state:

> More serious still was the likelihood that Assistant U.S. Attorney Hurd had also been aware that Moves Camp's testimony might be false even before he put him on the stand. Judge Nichol later concluded that Hurd did not have foreknowledge, but the whole

> lurid episode, which turned out to be the climax of the trial, was a fatal discredit to the prosecution.

Crazy Horse at 98. The entire discussion in context is a consideration of possibilities and likelihoods with respect to Moves Camp's testimony. The author concludes with the opinion that the only certainty is that the episode discredited the prosecution. Our conclusion that the second part of the challenged statement is opinion contributes to our view that the first part of the challenged statement is opinion as well. It is phrased in even more cautionary terms. The author describes the failure to investigate as "the very least" that can be said. He describes it as short of an inescapable conclusion that the F.B.I. gave Moves Camp the false information that Moves Camp used to testify, implying that it is unverifiable.[9]

In our view, the entire statement is opinion. So long as the underlying facts on which the opinion is based are substantially accurate, it is protected. *Janklow II*, 788 F.2d at 1305-06. Moreover, Judge Nichol's condemnation on the record arguably went further. He surmised that the FBI's "investigation" consisted of giving Moves Camp liquor, putting him up at plush resorts and overcompensating him for his short service as a witness in the amount of $2,074.50. *United States v. Banks*, trial transript at 21,749-50 (Defendants' Exhibit No. 26).

Even if we were to view the failure to investigate as fac-

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[9] *Accord Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986). In *Scott v. News-Herald*, a sports reporter accused a local school superintendent of committing perjury at a disciplinary hearing. The court found the accusations specific and verifiable. It decided, however, that in context they were opinion, rejecting a per se rule classifying accusations of criminal conduct as factual. The court based its decision on the cautionary language used and quite subtle signals that the writer thought that different interpretations of the events were possible, even though one was advocated. 496 N.E.2d at 708.

tual, Price's claims would still fail. Price has not related one thing he or anyone else did to confirm Moves Camp's testimony. Price only denies that nothing was done, failing to refer to any evidence. Price Aff. no. 1 at 7. Nor was the prosecution able to put any evidence before Judge Nichol to show that they investigated Moves Camp's story. *Banks*, trial transcript at 21,749. Furthermore, there is no evidence to show that the author entertained a subjective knowledge of probable falsity with respect to his comments on the investigation. He has relied on the public record. Summary judgment is appropriate for factually unsubstantiated claims, especially in this context.

Next, we consider Price's claim that he is accused of obstructing justice with regard to the rape. At the outset, we are confronted with a problem in fixing a precise meaning to the statements. While Price attaches an implication to the sequence of events as the book presents them, it is obvious that more than one interpretation is possible. The rape charges might have been dropped for insufficient evidence. The alternative, while no doubt fueled by the author's failure to exonerate Price as he exonerated Williams, is inexplicit. The author describes it as an "alleged" coverup of a "disputed" rape. In this respect, *Crazy Horse* closely mirrors the sentiments of the presiding judge. Judge Nichol found the conduct of Price in returning to River Falls outrageous, and Price's account incredible. Judge Nichol concluded that Price had likely influenced local authorities and also commented on the failure to investigate Moves Camp's story.

> The mere fact that the F.B.I. were — those words that I guess Mr. Lane put up on the blackboard: don't worry we'll go down, we'll go down to the police station, to Moves Camp. They do go down to the police

> station. There is no direct testimony that they said to the district attorney: now we don't think you should prosecute this case, but they did indicate that he was a witness. Certainly people in Wisconsin, twenty miles from there, or Hudson is twenty miles, and the little town they were in is another twenty miles; I think they probably read the Twin Cities' papers. They probably knew there was a Wounded Knee trial going on. And they indicated he was a witness in the Wounded Knee trial. I don't think they had to tell them that they would prefer they didn't prosecute. I think they got the message. But it's hard for me to believe that the F.B.I., which I have revered for many years, has fallen to that low an estate. . . . [With respect to confirming Moves Camp's testimony] * * * Since when does the head of the F.B.I. start telling the prosecution that they can't have a lie detector test if they want to? * * * [W]ell, I don't know just what their checking was. A lot of it, I know, must have taken place in bars over there in Wisconsin; maybe some other places that we haven't heard about. But to me it is almost incredible.

Banks, transcript at 21,749-54.[10]

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[10]Other commentators have attached at least the same meaning to Judge Nichol's words.

> David Price had spent several days with Moves Camp in a Wisconsin motel preparing the false testimony. * * * Williams "collaborated with Special Agent David Price in soliciting perjured testimony against Banks and Means from Louis Moves Camp."

Weyler, *Blood of the Land* at 119, 178.

> Judge Nichol also noted the subornation of perjury or the grossly negligent presentation of a lying witness, Louis Moves Camp. Agent Trimbach, the Court noted, had denied a request by the prosecutor to administer a lie detector test to Moves Camp. It is believed that Moves Camp's testimony was developed by Special Agent David Price and others, who were also responsible for maintaining Moves Camp in a form of protective custody.

Correspondence of Linda Huber of the firm of Tigar, Buffone and Doyle, to William Webster, Director of the Federal Bureau of Investigation at 4 (June 16, 1981) (Defendants' Exhibit no. 131).

While we think there is a defamatory implication in the author's presentation, we cannot distinguish this case from *Janklow II*. In *Janklow II*, the article accurately recited historical events and perhaps intentionally left a defamatory implication hanging relating to Janklow's prosecutorial motive. We nevertheless held that the article was protected. 788 F.2d at 1306. Crucially, Price does not challenge the essentials of the author's recitation of events. While he alleges that his contact with local authorities was minimal, the record establishes that, without Moves Camp, Price returned to River Falls and visited and talked with local authorities while they were deciding whether to prosecute, *Banks*, 383 F. Supp. at 395.

B. Myrtle Poor Bear

Myrtle Poor Bear is acknowledged to be a mentally unstable and unreliable witness.[11] She testified against an A.I.M. leader, Dick Marshall, and signed contradictory affidavits to support the extradiction of Peltier from Canada.

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[11]The government conceded so in oral argument before this Court in *United States v. Peltier*, 585 F.2d at 335 n. 18. Price, however, still insists that she is credible and lucid. Price Aff. no. 1 at 29-30. The exhibit he offers from the F.B.I. to buttress his view, however, does not support his claim. It merely says, "The above information is set forth not in an attempt to vouch for the credibility of Ms. Poor Bear's information." Plaintiff's Exhibit D at 20. Price also cites to a South Dakota state court decision for support. Yet it *criticizes Price's conduct at some length*, saying of Poor Bear:

> Myrtle's testimony itself and her demeanor on the stand at the hearing indicated to this Court that she is a shy, easily led individual of limited intelligence.
>
> * * *
>
> It is very obvious throughout the course of examination that Myrtle Poor Bear is one who can be very easily led and her testimony is fairly fraught with contradiction. Her value as a witness is obviously very limited.

Marshall v. State, July 17, 1979, slip op. at 4-6, 11, 17 (denying post-conviction relief) (Plaintiff's Exhibit E), *aff'd*, 305 N.W.2d 838 (S.D. 1981).

The prosecution elected not to call Poor Bear as a witness at Peltier's eventual trial, despite the inclusion in her original affidavits of a supposedly eye-witness account of Peltier murdering the agents. The defense attempted to call her as a witness to exemplify their claim that the government engaged in misconduct. The comments of Judge Ross questioning the F.B.I.'s conduct are set forth, together with views of the prosecutor, Director Webster and Agent Price. *Crazy Horse* at 371-73, 469, 473. Price objects to six statements that concern his conduct with respect to Poor Bear, alleging that he is accused of suborning perjury. Appellant's Brief at 22.

The first statement merely recites that the F.B.I. "supplied" Poor Bear as a witness against Dick Marshall. Complaint paragraph 10(d). Matthiessen does not say that Price suborned her perjury. He notes only that Price alerted the State to her usefulness. Moreover, the term "supplied" is the description used in F.B.I. reports. F.B.I. Teletype, April 9, 1976 (Defendants' Exhibit no. 52). The remaining five statements raise two issues: was it evidence that Poor Bear was unqualified, and was there misconduct with respect to her testimony and affidavits? Complaint paragraphs 10(n), 10(f), 10(o), 10(q) and 10(w).

The United States Attorney, Evan Hultman, who prosecuted Peltier, began his oral argument of Peltier's direct appeal before this Court by conceding that Poor Bear was incompetent to serve as a witness and that her affidavits were false. *United States v. Peltier*, No. 77-1487, transcript (April 12, 1978); Defendants' Exhibit No. 78. The affidavits were flatly contradictory. The first affidavit said that she left the site of the shootings before the agents arrived. The second was exactly the same, except the sentence saying she left was replaced with one that said that she was

present and saw Peltier kill the agents. The next day she gave an agent an explicit description of events not put in any affidavit, alleging that she tried to stop Peltier, that she had been raped by nine people before the incident, and that she escaped from the scene of the killings by shooting at one of Peltier's companions. She also said that A.I.M. had a hit list, that they drugged her by putting things in her coffee, that she was Marshall's girlfriend, that Marshall tried to kill her, that A.I.M. was going to bomb a school, and that she was Peltier's girlfriend. F.B.I. Reports (Jan. 20-26, 1976) (Defendants' Exhibit no. 58). She then signed a third affidavit claiming that she tried to escape from the site but was stopped and held by someone so that she was able to watch the shootings. She then alleged that she ran up to Peltier after the agents were shot, hit him, and then ran away. She has since recanted everything. *See, Marshall v. State,* 305 N.W.2d at 844 (Wollman, C.J., now a member of this Court, dissenting). No verification of her claims was made. Only the last two affidavits were submitted to the Canadian authorities. The Canadian prosecutor has indicated, "I did not have anything to do with the preparation of the affidavits and left this entirely up to the two agents who were controlling Myrtle Poor Bear." Defendants' Exhibit no. 91.

Whether Poor Bear was obviously unreliable or whether Price should have known that she was, are matters of opinion. The author merely comments on what he thinks must have been apparent to anyone who met her, who read the affidavits or, for that matter, who took her statements. Impressions such as this are unverifiable.

Additionally, Matthiessen asserts that Price should have been aware of her mental history, because the man who brought her to Price, Riggs, was aware of her condition.

Complaint paragraph 10(q). In reply, Price argues that Riggs, her high school principal, vouched for her credibility, Price Aff. no. 2 at 5, and that Matthiessen failed to interview Riggs. The factual statements are first, that Price and Riggs knew each other, which Price concedes, and second, that Riggs knew of Myrtle's psychological history, which is borne out by the record.[12]

Reckless disregard is not measured by what a prudent person would have investigated or published. *Secrist v. Harkin*, 874 F.2d at 1252; *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987), *cert. denied*, 99 L.Ed.2d 445 (1988). We do not believe that Matthiessen's failure to interview Riggs is fatal to the statement that Riggs knew of Poor Bear's condition and the author's qualified assertion that Riggs could have told Price. Riggs was a peripheral figure, and the Supreme Court has rejected higher showings of reckless disregard.[13]

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[12]Myrtle's sister testified that Riggs had taken her to the hospital during a disturbance Poor Bear once had. *Marshall v. State*, Post-Conviction Relief Hearing, *supra* note 11, transcript at 255 (1979) (Defendants' Exhibit no. 67). Available medical records recorded the incident.

> Five months later, another hospital record said that "Myrtle was acting very bizarre, crawling all over the floor saying worms were on her and biting her. The sister (who took her to the hospital) said Myrtle had been drinking and was brought to her house by the principal at Allen (where she lives), who said he found her by the side of the road acting the same way."

Minneapolis Star & Tribune 5B (Mar. 14, 1979) (Defendants' Exhibit no. 51).

[13]In *St. Amant v. Thompson*, the defendant based all of his allegations on the information provided by a sole member of a dissident faction within a union. He failed to investigate the source's credibilty or the foundation of the bribery allegation, and failed to talk to sources in a position to know the truth. The Court found no reckless disregard, writing:

> St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words.

The second issue concerns misconduct with regard to the affidavits. Complaint paragraphs 10(f), 10(o) and 10(w). It is obvious that, in context, the statements rely on public reports. The author concludes from all the events that the conduct of the prosecutors and agents constituted misconduct and repeats that same accusation as it is made by others. The allegation that she was "exploited" in an opinion. There are only two specific and verifiable statements of fact contained in these statements: First, that Poor Bear's affidavits were false, and second, that Poor Bear alleges that Price and another agent used improper interrogation methods. Both of these statements rely on public proceedings.

In oral argument on Peltier's appeal, Judge Ross and Mr. Hultman, the prosecutor, engaged in the following exchange:

> JUDGE ROSS: But anybody who read those affidavits would know that they contradict each other. And why the F.B.I. and Prosecutor's office *continued to extract more* to put into the affidavits in hope to get Mr. Peltier back to the United States is beyond my understanding.

These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson. 390 U.S. at 730.

In *New York Times*, a fund-raising solicitation appeared in a newspaper reciting imprecise factual allegations about the Birmingham police. The Times had made no effort to confirm the allegations, some of which were false and exaggerated. In addition, the Times had evidence in its possession which questioned the accuracy of the allegations. 376 U.S. at 287. The Court found no reckless disregard.

In contrast, in *Harte-Hanks*, the Court found reckless disregard where there was a high degree of awareness of probable falsity, combined with a subsequent pattern of selective investigation and deliberate avoidance of crucial information and witnesses. 57 U.S.L.W. 4853-56. There is no evidence in this case that Matthiessen possessed evidence that indicated that Riggs found Poor Bear credible or that questioning Riggs was in any way central to his investigation.

MR. HULTMAN: Yes.

JUDGE ROSS: Because you should have known, and the F.B.I. should have known that *you were pressuring* the woman to add to her statement.

MR. HULTMAN: Your Honor, I personally was not present at that stage. I read the affidavits after they had been submitted, so I want this court to know that.

JUDGE ROSS: The Government —

MR. HULTMAN: And I don't excuse, by my remark just now to Your Honor, I don't in any way excuse what the court has just indicated. Your Honor, I have trouble with that myself, and Your Honor that is the exact reason which I did read these affidavits and put together the fact that — And that gets to the second point, Judge Gibson and Judge Ross. It was clear to me her story didn't later check out with anything in the record * * * . * * * And it was then that I personally made the decision that this witness was no witness. First of all, because she was incompetent in the utter, utter, utter ultimate sense of incompetency * * * [and because] there was not one scintilla that showed Myrtle Poor Bear was there, knew anything, did anything, et cetera.

JUDGE ROSS: But can't you see, Mr. Hultman, what happened happened in such a way that it gives some credence to the claim of the —

MR. HULTMAN: I understand, yes, Your Honor.

JUDGE ROSS: — the Indian people that the United States is willing to resort to any tactic in order to

bring somebody back to the United States from Canada.

MR. HULTMAN: Judge —

JUDGE ROSS: And if they are willing to do that, they must be willing to fabricate other evidence. And it's no wonder that they are unhappy and disbelieve the things that happened in our courts when things like this happen.

MR. HULTMAN: Judge Ross, I in no way do anything but agree with you totally.

* * *

JUDGE ROSS: We have an obligation to them, not only to treat them fairly, but not give the appearance of manufacturing evidence by interrogating incompetent witnesses.

Defendants' Exhibit No. 78 at 3-5 (emphasis added).

The author cites this exchange at length. *Crazy Horse* at 371-73. The words used in the book, "exploited" and "misconduct," mirror Judge Ross' commentary and are similar to statements made in two opinions of this Circuit. *United States v. Peltier*, 800 F.2d at 778 ("misconduct"); *United States v. Peltier*, 585 F.2d at 335 n.18; *see also, Marshall v. State, supra* note 11, at 4-6. The conclusion that the affidavits were false comes from Judge Ross and Mr. Hultman. Poor Bear's allegations of mistreatment by Price were also made on the record. *Marshall v. State*, 305 N.W.2d at 845 (Wollman, C.J., dissenting). We think Matthiessen's use and repetition of these judicial proceedings is privileged under *Greenbelt Cooperative Publishing Assoc. v. Bresler*,

398 U.S. 6 (1970) (newspaper article called the plaintiff's tenacious negotiation posture as "blackmail," as well as quoting a statement made at a public meeting to that effect). Moreover, Price's version of the events was presented. *Crazy Horse* at 468-69.

C. Anna Mae Aquash

Anna Mae Aquash was an A.I.M. activist wanted by the F.B.I. She was the victim of an unsolved homicide. Her body was discovered several miles from the nearest village during the winter following the shootings. She was initially unidentified. At least one F.B.I. agent arrived on the scene to assist the local investigation. Agent Price photographed her body when it was brought to town. The first autopsy attributed her death to exposure, finding only a small contusion on her head. Her hands were removed and sent to Washington, D.C., for identification. Meanwhile, she was buried as Jane Doe. After her identity was discovered, her body was exhumed for a new autopsy. The second autopsy quickly concluded that she had been executed by a bullet fired point-blank into the back of her head, which made an entry wound and left a bulge in her head where it stopped.

Price attacks six statements found in the book which allege that Aquash's death was suspicious, that Price should have recognized her because he had met Aquash before, that there were rumors that the F.B.I. killed her, and that some people thought that Price had killed her. Complaint paragraphs 10(f), 10(g), 10(8), 10(k), 10(m) and 10(x). Price reads these statements together to mean that he is being accused of murder. Appellant's Brief at 19.

Whether or not the circumstances of Aquash's death were "suspicious" is a matter of opinion, as is whether or not Price should have recognized her when the body was found.

The only factual statement with regard to the latter is that Price had met Aquash before. Price acknowledges that he had met her twice before, but indicates that he could not recognize her on sight and that her body was partially decomposed when it was found. Price Aff. no. 2 at 6-9. Whether he should have recognized her after she was found is obviously speculative and unverifiable. The author offers statements from doctors and other saying that it might or might not have been possible, given the body's decomposition. *Crazy Horse* at 260-67. *Crazy Horse* offers the opinion of the doctor from the second autopsy and the man who found her that recognition would have been difficult. The author asked Price why he failed to recognize her and reports Price's answer. *Id.* at 469.

Next, we consider the reporting of rumors about the murder, together with the author's summation, "No one I have talked to makes the serious claim that David Price killed Anna Mae Aquash * * * ." *Crazy Horse* at 445. Rumors that talk of the F.B.I. or white people in general but fail to mention Price are irrelevant in the absence of a direct accusation. Complaint paragraphs 10(i) and 10(m). We therefore focus on the statement: "Kunstler took this matter up with Agent Price, whom some of the Indians, at least, had suspected of involvement in the killing * * * ." Complaint paragraph 10(k). This phrase appears as a transition in the book between attorney Kunstler's questioning of an A.I.M. member about Aquash's death and his questioning of Agent Price about her death. *Crazy Horse* at 304-08. During an offer of proof, the A.I.M. witness testified that Aquash had said Price had threatened Aquash with death if she didn't cooperate. It is immediately after this that the statement reporting suspicions about Price

appears. This statement is in turn immediately followed by Price's testimony that he made no such threat. *Id.* at 306-07.

Whether or not Price killed Aquash is a question of fact. But obviously the author makes no such accusation. He exonerates Price of killing her. Complaint paragraph 10(m). We do not believe that Price can choose what meanings to attach to these statements where several are available. *Fudge*, 840 F.2d at 1016.[14]

Whether or not people suspected Price of involvement is another matter. First, it is not clear what exactly Price is suspected of — "involvement" is a vague term. It might refer to aiding or abetting, or to hiding things in the investigation, or to making her a target by making her an informer, or merely to making her a target by questioning her, thus giving her the appearance of being an informer. These possibilities are also raised by reading the statements together.[15] The suspicions about "involvement" are thus too vague for us to conclude that Price is accused of criminal conduct. *Secrist v. Harkin*, 874 F.2d at 1250-51. Surely, Price would not want to be sued for his claim that an Indian named

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[14]For example, Price argues that an earlier character statement could suggest he had someone else kill Aquash. The underlined portion of the following statement was included in Price's brief:

> "At least Price sometimes tries to act nice; this guy doesn't even try." One day a friend of Ellison who had been working with AIM Indians heard a hard honking at a Rapid City stoplight, and glancing over at the next car, found himself gazing down the barrel of Wood's handgun; apparently Wood intended this as some sort of warning. "He wants somebody in his gunsights very bad, he's just looking for an excuse," Ellison says, "whereas *Price is content to manipulate people, let somebody else do the shooting.*"

Crazy Horse at 266; Appellant's Brief at 22. Price then contrasts this statement with one found on page 445 that relates that Indian medicine men had received a message during a religious ceremony that a white man had an Indian kill Aquash. Price puts the two statements together to suggest that he is being accused of having someone kill Aquash. We think that, in context, the first statement is a comparison of Agents Wood and Price. The reference to "someone else shooting" refers to Wood, and not to any mysterious Indian that Price ordered to kill Aquash, as Price contends.

Black Crow was involved or had information about Aquash's murder. *Crazy Horse* at 469-70.

We reach the same conclusion with respect to the other statements regarding Aquash. One statement quotes someone saying that he thought a law enforcement official killed her, then the excerpt in Price's complaint quotes the author saying that "Inevitably, local suspicion focused on David Price * * * ." *Id.* Complaint paragraph 10(i). In between these two quoted parts of the statement, the text of the book omitted from the complaint indicates that the F.B.I. in general is accused of blackmail, as well as a lack of interest and faulty work in the investigation. It is thus not clear whether local people suspected *Price* of murder, blackmail, or merely of poor investigating. This statement is also unspecific.

Furthermore, were we to focus on Price's interpretation, we would nevertheless affirm because Price cannot show that this statement or the others are false or made with reckless disregard. The fact at issue would be whether people suspect Price of being "involved." Price's denials of involvement are not to the point. Moreover, the author quotes sources voicing their suspicions. *Crazy Horse* at 267.

We do not know how authors can ever write about controversies without reporting accusations and counter-accusations. Price was given a chance to respond, which he used to accuse an Indian named Black Bear of involvement. *Crazy Horse* at 469. The book also includes official F.B.I.

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[15]For example, Dennis Banks believed that the F.B.I. was involved insofar as it had made her appear to be an informer. "The Senate found that the FBI used a so-called 'snitch-jacket' tactic to sow divisiveness and violence among activists. * * * The more Banks considered the matter the more he realized that, even if AIM members had killed Aquash, the FBI bore responsibility because it had helped launch rumors about her." *The Killing of Anna Mae Aquash*, Rolling Stone 54 (April 7, 1977).

statements exonerating the investigations. *Crazy Horse* at 267. We believe that the author has merely recited the accusations and counter-accusations, and has *strongly* indicated that he believes Price is innocent of the death of Aquash. The author does not espouse either side's accusations. We believe that these statements are protected.

D. Harassment

Two of the statements listed in the complaint allege investigatory harassment. Complaint paragraph 10(a) and 11(g). The first describes Price's conduct in evaluative terms, "open and even aggressive surveillance * * * 'he even photographed our cats and dogs.'" This statement is full of rhetorical hyperbole and would be understood as an opinion.[16]

The second statement quotes the account of a local Indian girl that Price entered her home without a warrant. This is factual, and thus we are concerned with its truth or falsity and whether the author would have reason to believe it was false. In his first affidavit, Price did not indicate that he had a warrant. Attached to his second affidavit, however, Price included a copy of the relevant F.B.I. report. The report indicates that he had a "witness" warrant. Price Aff. no. 2, Exhibit H. We are not sure if the report refers to a subpoena or a warrant, nor is it clear whether Price had a copy of either with him. Neither side has presented us

[16]Price contests the accuracy of the claim that he moved next door to the Wounded Knee Legal Defense Committee offices in March of 1973. He alleges that he was in Chicago in March. Price Aff. no. 1 at 5. We do not believe this is a substantial dispute, especially in light of Price's testimony under oath that he was there sometime after that. *Wounded Knee Legal Defense/Offense Committee v. F.B.I.*, 507 F.2d 1281, 1283 n. 3 (8th Cir. 1974). Price is careful to deny the allegations only with respect to the month of March, Price Aff. no. 1 at 5, and no events that particularly occurred in March are prominently discussed.

with any direct evidence on this point. We believe that this may be sufficient to create a contest as to the existence of a warrant. It is, in any event, insufficient to show by clear and convincing evidence that Matthiessen reported the girl's account with reckless disregard. The report states:

> EVELYN BORDEAUX then went to a hallway leading to the bedrooms and bathroom, and stood in the hallway screaming at the Agents that they needed a search warrant and that they had to have a copy of the arrest warrant.

Price has never indicated that he showed the family any documents. There is no evidence that the author knew or should have known that the girl's account was false, if it is.

E. Character Statements

The remaining statements are all character attacks on Price. Complaint paragraphs 10(s), 10(t), 10(u) and 10(v). The first quotes an attorney calling Price "corrupt and vicious." The other three statements express the view of the author that Price alters facts to fit his pre-conceptions, that he would be soiled by his acts no matter whether he paid any penalties, and that he exemplified dishonest government. All these statements are opinion. They are unspecific, unverifiable and are protected criticisms of a public official's performance of his duties. The surrounding text constitutes the author's reflections on Price and clearly signals opinion.

V. RECKLESS DISREGARD

In *St. Amant v. Thompson*, the Court indicated what types of evidence might suffice to show reckless disregard

in a story: if there was evidence that the story was fabricated, if the story was inherently improbable, if the sources were entirely anonymous and their reports unverified, or if there were particular reasons to doubt sources. 390 U.S. at 732; *accord Tavoulareas v. Piro*, 817 F.2d 762, 790 (D.C. Cir.), *cert. denied*, 98 L.Ed.2d 151 (1987).

Price's arguments lack the specificity called for in *St. Amant*. He has to show by clear and convincing evidence that Matthiessen published particular false material facts with knowledge of their probable falsity. He never contests the accuracy of Matthiessen's quotations of primary sources. In lieu of evidence that shows Matthiessen doubted particular statements, Price makes general allegations relating to Matthiessen's slant. He cites the profit-sharing agreement as evidence that Matthiessen had an incentive to defame him. He faults Matthiessen for relying on "hoodlums, criminals and movement lawyers." Appellant's Brief at 40.

On this record, Price has failed to show by clear and convincing evidence that Matthiessen published particular facts with knowledge of their probable falsity. Instead, Price has turned the legal argument into the type of political rhetoric best left to open and free speech. Far more substantial and specific claims than this have failed. *See, supra* note 13.

B. Viking Penguin

The existence of reckless disregard must be proved with respect to each defendant. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *St. Amant v. Thompson*, 390 U.S. at 731-32; *Speer*, 828 F.2d at 477; *Hunt v. Liberty Lobby*, 720 F.2d 631, 648 (11th Cir. 1983). *Cantrell* permits reckless disregard to be imputed only on a theory of respondent superior. If Matthiessen is not an employee

of Viking, independent evidence of Viking's culpability is required. *Hunt v. Liberty Lobby*, 720 F.2d at 649; *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610, 618-19 (Cal. 1984).

The deposition of Viking's editor for this project, Elizabeth Sifton, makes clear that Viking played only a limited role in the story's development. Sifton had worked with him on his award-winning book, *The Snow Leopard*, and considered him to be an "immensely meticulous, scrupulous and obsessively attentive writer who reworks and reworks and reworks his manuscripts until he has them the way he wants them." Sifton Deposition at 48-49 (Oct. 8, 1986). Because of his reputation and success, Matthiessen is in demand by publishing houses. *Id.* at 65-69. Sifton's role was to be a "sounding board." *Id.* at 80. He consulted her on structural matters and for expository decisions on how to allocate space and attention. *Id.* at 81, 111. Her principal concerns were length, *id.* at 83, 90-91, and coherence, *id.* at 111. Viking undertook no factual review, but the editors were aware of Matthiessen's fact checking process of looking at original documents and sending out drafts to people acquainted with the events. *Id.* at 114. Matthiessen clearly was not an employee of Viking such that liability could be imputed, were we to find any. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1307 (N.Y.), *cert. denied*, 434 U.S. 969 (1977).

VI. CONCLUSION

Sometimes it is difficult to write about controversial events without getting into some controversy along the way. In this setting, we have decided that the Constitution requires more speech rather than less. Our decision is an

anomaly in a time when tort analysis increasingly focuses on whether there was an injury, for in deciding this case we have searched diligently for fault and ignored certain injury. But there is a larger injury to be considered, the damage done to every American when a book is pulled from a shelf, as in this case, or when an idea is not circulated.

As a result, we have asked the plaintiff to do a great deal more than establish his disagreement with the book. We have asked him to select what he finds objectionable, to explain why it has a precise core of meaning, to persuade us that it is a factual matter capable of the jury's resolution, to show that he could demonstrate its falsity, and to convince us that he could show with clear and convincing evidence that the author had a high degree of awareness of a particular statement's probable falsity. That Agent Price cannot surmount these obstacles implies no condemnation of him. He worked diligently for the government while he was assigned to South Dakota. Local prosecutors commended him for his efforts.

> Agent Price is particularly noted by our office for his enthusiasm and the zeal with which he works and prepares his cases. Without referring to our records, I believe it can safely be said that a conviction has been obtained in every case prepared by David Price and prosecuted in the Western Division of this District. This alone speaks highly for the caliber of work which he has presented to our office. It is the view of our Rapid City office that Agent Price has been and continues to be highly valuable in our efforts to maintain a high rate of successful prosecutions.

Correspondence from U.S. Attorney for South Dakota to the F.B.I. Price. Aff. no. 2. Exhibit A. Unfortunately, Price

also became involved in public controversies during his service and, in the posture of this case, we must focus on the bad things that have been said.

At the same time, we recognize that the plaintiff's complaint has taken statements from their setting in a way that distorts the flavor of the book. In its entirety *Crazy Horse* focuses more on public institutions and social forces than it does on any public official. The sentiments it expresses are debatable. We favor letting the debate continue.[17]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX

Paragraphs 10 and 11 of the complaint include the following statements at issue in this appeal.

> 10(a) "On August 16, when the defense rested, the government introduced a last-minute 'surprise' witness who, in Tilsen's words, 'filled in every gap in the prosecution's case, directly connecting the defendants to the alleged offenses — it was amazing!' In addition, this witness offered testimony in support of the F.B.I.'s cherished belief that the international Communist conspiracy was somehow behind A.I.M.; he declared that agents from Russia, China, and Czechoslovakia had attended the first meeting of the A.I.M.-sponsored International Indian Treaty Council in June 1974, at Mobridge, on the Standing Rock Reser-

[17] *See* Weisman, *About That "Ambush" at Wounded Knee*, Columbia Journalism Rev. 28 (September/October 1975) (press coverage one-sided).

vation, where an estimated thirty-six hundred people from ninety-seven Indian nations had agreed that Indian self-government was the only hope.

As it turned out, this useful witness had been located by an F.B.I. agent named David Price, who was already well known to the Defense Committee. In March 1973, Special Agent Price had arrived in Rapid City, where he moved in next to the Defense Committee headquarters; he later became a neighbor in Sioux Falls (the original site of the Banks-Means trial). In both places, SA Price had kept the Indians' lawyers and legal aides under open and even aggressive surveillance 'He even photograped our cats and dogs,' one aide remembers, 'and he took real glee in it; you can't be around Price very long before picking up that he goes far beyond the requirements of his job. He's an all-American boy, slim and trim, with freckles and an angelic nose, and reddish-blond hair combed over his bald spot. But there's a lot of aggression there, there's something *mean;* he's a very complex man. Price can be very friendly when he feels like it, and he can also look you in the face and lie — and know you know he's lying — and still not show a damned thing in his eyes.'

David Price's surprise witness was former A.I.M. member Louis Moves Camp, twenty-two, . . ." *(Crazy Horse,* at 93).

10(b) (in part) "In cross-examination, the defense established that before the rape charge against Moves Camp was dropped, Price had conferred for several hours with the state prosecutor as well as with River

Falls police, and had made it clear to his fellow lawmen that Moves Camp was a crucial witness for the prosecution in the Means-Banks trial; it also turned out that prosecutor Hurd had known of the rape charge before putting Moves Camp on the stand, but that he had chosen to accept Price's reasoning that because the charge had been withdrawn, rape had not occurred. . . .

After the trial — despite the vivid account of his experience as related by Williams — Moves Camp denied any memory of the young woman. The agents had gotten him drunk, he said, and when he woke up in the morning, Price and Williams, apprising him of the alleged rape, had offered to help him avoid prosecution on this charge in exchange for his testimony against Means and Banks, which he had been thinking that he might withdraw. * * *

Ronald Williams, who did not accompany David Price on his consultation with the local authorities in River Falls, cannot be implicated in the alleged coverup of the disputed rape." *(Crazy Horse,* at 96-97).

10(c) "More serious than Louis Moves Camp's lies was the all but inescapable conclusion that Agent Price and perhaps Agent Williams had knowingly prepared this man to give false testimony; at the very least they found his story so convenient that they had not bothered to find out if it was true." *(Crazy Horse,* at 98).

10(d) "The prosecution's dilemma was resolved when a last-minute witness, whose name had not been presented at the pre-trial hearings, was "supplied" to

the state by F.B.I. agents David Price and William Wood. For producing the perjurious witness Louis Moves Camp against Russell Means and Dennis Banks in their St. Paul trial in 1974, Price had won an outraged denunciation from the judge; this time, his witness was a Myrtle Lulu Poor Bear, a cousin of Marion from Marshall's village, who identified herself as a friend of the defendant and his wife, Cleo, and hinted that she had been Dick Marshall's girl friend. Like Louis Moves Camp, Myrtle Poor Bear filled in all the missing pieces in the prosecution's case . . . ." (*Crazy Horse* at 275-76).

10(f) (in part) "Why had such a large group of law officers come to the death scene, one hundred miles out of Pine Ridge, when reports of dead bodies on Pine Ridge, routine and otherwise, have been common for years? The body and the death scene were inspected for two hours: this being the case, how was it possible that none of the agents or police officers noticed the lump on the temple or the hole in the back of the head, or even wondered how or why this person had arrived so far out in the uninhabited winter badlands, at least ten miles from the nearest settlement at Wanblee? And how was it that no law-enforcement officer at the death scene (or at the hospital) suspected the identity of a well-known fugitive whose description had been widely circulated since November and whose appearance was well known at firsthand to at least one man said to have been present? . . . Why, in short, did every circumstance seem to bear out the observation made by Kenneth Tilsen, lawyer for the Pictou family:

'The F.B.I. wanted the investigation to go cold because they thought it would lead them somewhere that they didn't want to go.'

In pictures taken at the second autopsy, it was reported, the young woman's features were still distinguishable. That being the case, why didn't this body with its distinctive turquoise jewelry — not often found on a routine drunk, dead of exposure — arouse either curiosity or recognition in that agent who had allegedly been present at the death scene, who had assisted with the photography at the time of the first autopsy (the F.B.I. refused to release these pictures), and who, less than six months earlier, at Rosebud, had exclaimed to the victim, "There you are! I've been looking all over for you!" This agent, SA David Price, was later accused by a ResMurs witness of suggesting that the F.B.I. could get away with anything on the reservation, and that failure to cooperate might bring down upon this witness the same fate that befell Anna Mae Aquash, who certainly failed to cooperate as well. The same witness would claim that William Wood — who had also seen Anna Mae before, at Rosebud — had mentioned that he knew her identity before the severed hands were sent to Washington." (*Crazy Horse* at 263-65).

10(g) "Kenneth Tilsen says flatly, 'No one who knew Anna Mae has failed to recognize her from pictures taken at the second autopsy.' Dr. Peterson, who took these pictures, remarked at the time that the body was 'not severely decomposed'; even so, he says today, he was 'not as shocked as some people that identification

wasn't made from the facial features; the face of a deteriorated body is harder to identify than people think. You could say she was *consistent* with someone, but not much more.' Roger Amiotte, who found the body, said much the same thing: the face 'was intact, but it would have taken someone who knew her pretty well to identify her.' But unlike Tilsen --- and unlike Price — neither Peterson nor Amiotte had ever seen Anna Mae alive." *(Crazy Horse* at 265-66).

10(i) "An A.I.M. leader interviewed that spring said, 'A.I.M. didn't kill her, the pigs got to her first. They knew we knew who she was, and they wanted to blame A.I.M. with her death.' This same person thought that the F.B.I. was trying to blackmail Anna Mae by threatening to expose her as an informer, whether she was an informer or not. A continuing lack of F.B.I. interest in any serious investigation of her death (despite the large turnout of lawmen at the scene of the crime, the F.B.I. did not search the area thoroughly until three weeks after the body was found, according to Roger Amiotte, who found it) encouraged rumors among the Indians that she had been killed in retaliation for the agents' deaths, . . .

Inevitably, local suspicion focused on David Price, who was already notorious on the reservation; Price himself remarked that he had heard that A.I.M. had put a contract on his head." *(Crazy Horse* at 267).

10(k) "A few days later, Kunstler took this matter up with Agent Price, whom some of the Indians, at least, had suspected of involvement in the killing: . . ." *(Crazy Horse* at 306).

10(l) "Stewart, whose extensive jail record included a conviction for first-degree manslaughter, was one of those who had spread the story that Anna Mae Aquash was an informer; he was also rumored to have known more than he should about her death. In the spring of 1976, his estranged wife, Dorothy Brings Him Back, showed WKLDOC attorneys a note sent to Stewart at her address which read in part, 'I have to talk to you — Dave.' Because the handwriting looked familiar, Bruce Ellison compared it to initialed F.B.I. 302 forms, and in his opinion, the 'D' is identical to those made by David Price." *(Crazy Horse* at 289).

10(m) "In all likelihood, most people feel, the original suspicions about Anna Mae were spread by Douglass Durham, who tried to discredit anyone he did not control, and these rumors intensified when David Price questioned her in March 1975; apparently Price was working with John Stewart, who may have started the rumors in Oglala. But despite occasional suggestions to the contrary and lurid articles on this case, no one I have talked to makes the serious claim that David Price killed Anna Mae Aquash; all seem to agree that whoever was responsible for the death, it was an Indian who pulled the trigger. It is sometimes said that Lakota medicine men, making their own Indian-way investigations, had received the message in the sweat lodge: an Indian had killed Anna Mae at the direction of two white men, and sooner or later the names of the killers would come out. As Red Cloud remarked of Spotted Tail's death, '. . . an Indian did it. But who set on the Indian?" *(Crazy Horse* at 445-46).

10(n) "Benson could not or would not see that the two F.B.I. agents who had prepared her testimony in two separate cases, and who knew her well, were at least as aware as Hultman that their witness was unqualified, and that under those circumstances their exploitation of her to ensure Peltier's extradition had been a flagrant example of the misconduct on which the defense had built its case. Having decided in the first days of the investigation that Peltier was guilty (the defense declared), the F.B.I. had constructed evidence to fit that theory, and meant to see him convicted by fair means or foul. Once Peltier had been returned to the United States, there was no point in putting that witness on the stand, where her instability might undermine the jury's confidence in the integrity of the U.S. attorneys." *(Crazy Horse* at 348).

10(o) "Stating that A.I.M. had promised her protection if she would simply tell the truth, she declared that she had signed those affidavits only because 'Dave' and 'Bill' had threatened her and her young child with harm; it was also 'Dave' and 'Bill' who had rehearsed her intensively for this trial in a motel room in Kansas City. Among other tactics, the agents had cited the mysterious murder of a young woman on the reservation, showing Poor Bear pictures of the corpse and suggesting that she could also be executed with impunity, since everyone would think that A.I.M. had done it. Like Angie Long Visitor, the plump, unprepossessing Poor Bear was in tears throughout her interrogation, which at one point had to be interrupted while she regained her composure." *(Crazy Horse* at 348).

10(q) ". . . Her sister Elaine says that Myrtle was forever lying and hallucinating, and that the family expected it; that she was never raped or thrown from a horse, had never lost a boyfriend at Wounded Knee, had never had a husband (or any other man) who threatened to take away either of her two illegitimate children. Since Myrtle's school principal in Allen, who was consulted by Agent David Price, was well acquainted with this pathetic history, one can fairly assume that Price and Wood were aware of it, too." *(Crazy Horse* at 453).

10(s) "Tilsen, who has dealt with Price since the time of Wounded Knee, and knows most of the Indian people Price has dealt with, had no patience with my speculations on this man's blind obedience to the system. 'In my opinion, David Price is one of the most corrupt and vicious agents in the F.B.I. . . .' " *(Crazy Horse,* at 461).

10(t) "To judge from his speech, David Price is not a stupid man, but one whose intelligence is severely limited by preconceptions — either that, or he is a liar who not only believes but is angered and moved by his own lies. Despite his awful sentimentality—about Myrtle Poor Bear, about the idealism of his fellow agents—his outrage about Ron Williams's death is genuine; and he does not whine about his villain's role, but seems to accept it in the line of duty. Despite the great amount of evidence of his misconduct, Price acknowledges nothing wrong in his own actions. 'There's no reason for me to get upset about absurd allegations,' he declared at one point. 'I know the al-

legations; if you write it up on allegations, you'll be writing a lie!' " *(Crazy Horse* at 471-72).

10(u) ". . . Like Myrtle Poor Bear and Angie Long Visitor, like the young Navajo boys bullied into testifying against their leaders, like many others on both sides whose lives have been corrupted to ensure the victory of the United States over Leonard Peltier, this man on the other end of the wire was only another casualty of the new Indian wars, and he would be soiled for the rest of his days by deeds done in the belief that the end justified the means, whether or not he ever pays a formal penalty." *(Crazy Horse* at 472).

10(v) "During his tenure in Rapid City, the Special Agent in Charge of the Oglala investigation, Norman Zigrossi, told WKLDOC's Bruce Ellison that if any evidence was forthcoming that any of his men had abused their positions, those men would be gotten rid of that same day. When Ellison cited the numerous complaints that the Oglala people had made against David Price, Zigrossi said he regarded Price as 'a model agent.' What is alarming here is not that Zigrossi is wrong but that he is right; according to the value system of the FBI, Price is indeed 'a model agent,' in the same way that 'Doug' Durham was a model informant, who carried out his job faithfully and well; in the same way that Richard G. Held was a model head of the Internal Security Section in charge of those 'anti-terrorist' counterintelligence activities that used to go under the name of COINTELPRO, and therefore became Associate Director of the FBI. What these men did right is precisely what is wrong with the FBI, and with the Justice Department, and with a government

of quick-stepping bureaucrats and politicians for whom truthfulness and integrity have been reduced to an aspect of public relations. As Dick Marshall says, 'The U.S. government won't obey the laws its own Congress enacted, so it's up to us, the people with respect for land and life, to join hand in hand.' " (*Crazy Horse* at 474).

10(w) ". . . And since Marshall's continuing appeal is essentially based on F.B.I. misconduct involving the same witness whose false affidavits ensured Leonard Peltier's extradition from Canada, the outcome of his case is bound to affect Peltier's own chance for a new trial." (*Crazy Horse* 476).

10(x) "Because of increasing F.B.I. pressure, most of the A.I.M. people were using aliases: Anna Mae called herself 'Joanna Jason,' a name she had used in California. But in April she was detained and interrogated by Agent Price, who claimed to be investigating the fatal shooting of Jeannette Bissonnette. Because the F.B.I. had shown so little interest in Indian deaths, it is now believed that Price's investigation was an F.B.I. excuse to check out the unknown A.I.M. people from outside the reservation who were living at Oglala, but in the paranoid atmosphere of A.I.M., her contact with Price, occurring within weeks of Douglass Durham's exposure left Anna Mae open to the suspicion that she herself might be an informer, for hadn't she, too, been close to Banks?" (*Crazy Horse* at 142).

11(g) "Resisting arrest, the spirited young Jean Bordeaux had to be taken into custody by force after her mother's front door was broken down, and she

refused to speak when dragged before the jury. '. . . Then in November I got in an accident, and my face was all beat up, and the very next morning — I mean *real* early, I was still in my nightshirt — them F.B.I.s came pushing in without a warrant, carrying M-16s.'

'That one called Price says, we think your kids have information about who killed our men,' Evelyn Bordeaux remembers, 'and my husband told 'em, That ain't no reason to yank young kids around like that.'" (*Crazy Horse* at 246-47).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil 4-85-819

David Price,

Plaintiff,

vs.

Viking Penguin, Inc., Peter Matthiessen, and Bruce Ellison,

Defendants.

MEMORANDUM OPINION
AND ORDER

Daniel P. O'Keefe, Esq., and Roger J. Magnuson, Esq., Dorsey & Whitney, 2200 First Bank Place East, Minneapolis, MN 55402, appeared on behalf of plaintiff.

Martin Garbus, esq., and Richard Kurnit, Esq., Frankfurt, Garbus, Klein & Selz, 485 Madison Avenue, New York, NY 10022, appeared on behalf of defendants Viking Penguin, Inc., and Peter Matthiessen. Barbara F.L. Penn, Esq., 2220 American National Bank Building, St. Paul, MN 55101, also appeared on behalf of Viking Penguin, Inc.

Bruce Ellison, Esq., P.O. Box 2508, Rapid City, SD 57709, appeared pro se.

Plaintiff David Price, an agent of the Federal Bureau of Investigation (FBI), brought this defamation action against defendants Viking Penguin, Inc. (Viking), Peter Matthiessen, and Bruce Ellison in connection with the publication of the book *In the Spirit of Crazy Horse*. Plaintiff alleges that the book defames him in connection with events at Wounded Knee, South Dakota in 1973 and events surrounding and subsequent to the killing of two FBI agents on the Pine Ridge Indian Reservation in 1975. Plaintiff seeks $25 million in compensatory damages. Diversity jurisdiction is alleged. The matter comes before the court on motions for dismissal or summary judgment brought by defendants Viking and Matthiessen.

I.

A.

This action has been vigorously litigated in more than one forum.[1] Plaintiff commenced the action on February 9, 1984 in the United States District Court for the District of South Dakota against defendant Viking, the publisher of the book *In the Spirit of Crazy Horse;* defendant Matthiessen, the author of the book; and defendant Ellison, who allegedly supplied information for the book. Plaintiff asserted causes of action for defamation, intentional infliction of emotional distress, false light invasion of privacy, and prima facie tort. Plaintiff also filed an identical action in South Dakota state court. After the state court granted the motion of defendants Viking and Matthiessen to dismiss

[1]This court has issued a number of previous orders and opinions in this case which provide additional background. *See, e.g.*, 625 F. Supp. 641 (1985); 113 F.R.D. 585 (1986); 654 F. Supp. 1038 (1987); 115 F.R.D. 40 (1987); 115 F.R.D. 43 (1987).

for lack of personal jurisdiction,[2] plaintiff and defendants Viking and Matthiessen stipulated to the transfer of the federal action to the District of Minnesota. The federal action was transferred here on June 25, 1985.

Defendants Viking and Matthiessen then moved to dismiss and for a stay of discovery pending determination of their motion. Discovery was stayed on October 7, 1985, and the court subsequently dismissed certain of plaintiff's claims. These were claims for intentional infliction of emotional distress, false light invasion of privacy, and prima facie tort, as well as a number of the defamation allegations. *Price v. Viking Press, Inc.*, 625 F. Supp. 641 (D. Minn. 1985). The court determined that plaintiff was entitled to further discovery before any ruling with respect to the remaining defamation allegations. *Id.* at 648-49. After settlement efforts by a special master[3] failed to bear fruit, the court lifted the stay of discovery on August 5, 1986.

Discovery thereafter ensued for a period in excess of one year.[4] Depositions were taken of plaintiff; defendant Matthiessen; defendant Ellison; Elisabeth Sifton, Matthiessen's editor at Viking; James Leach, an attorney who worked with

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[2]The state court also granted a motion by defendant Ellison to dismiss for failure to state a claim.

[3]The court convened a conference call with the parties on January 10, 1986 to discuss appointment of a settlement master. At the start of the conference, the court referred to the policy considerations on each side of the case and the conflicting ways the parties view themselves. Plaintiff no doubt sees himself as a public servant performing difficult and dangerous work who has been unfairly and meanly portrayed for his efforts. Defendants, on the other hand, say they are performing the important function of criticizing government conduct through the full dissemination of information and ideas. The parties agreed to appointment of a special master, and a number of settlement attempts followed without success.

[4]In addition to discovery between the parties, defendants have also sought discovery from the government to establish the truth of the allegedly defamatory statements. Disputes arose between defendants and the government over this discovery, some of which also involved plaintiff.

the Wounded Knee Legal Defense/Offense Committee (WKLDOC); Karen Northcott, a WKLDOC aide; Kenneth Tilsen, an attorney who was one of the founders of WKLDOC and other persons associated with the book.[5] In an order dated December 12, 1986, the court granted, in part, a motion by plaintiff to compel discovery and established a standard for the scope of discovery. 113 F.R.D. 585 (D. Minn. 1986). Another motion to stay discovery by defendants Viking and Matthiessen was denied on February 20, 1987. 115 F.R.D. 40, 41 (D. Minn. 1987). A petition of defendants Viking and Matthiessen for favorable findings toward disclosure of grand jury testimony was granted in part on March 2, 1987. *Id.* at 42-43. On March 16, 1987, the court extended the deadline to allow further discovery to be conducted. 115 F.R.D. 43 (D. Minn. 1987). The parties were then given the opportunity to supplement the record with additional evidence obtained through this discovery. Defendants again moved to extend the discovery deadline on September 9, 1987; plaintiff opposed the motion. Rather than reach the merits of this dispute, on September 29, 1987, the court stayed any additional discovery pending resolution of the motions now before it.

On February 19, 1987, the court dismissed the claims against defendant Ellison on the basis of res judicata. 654 F. Supp. 1038 (D. Minn. 1987). A counterclaim asserted by defendant Ellison remains in the case, however. At the hearing on his motion, Ellison stated that he also has an action against Price pending in South Dakota state court. He is a resident of South Dakota and never agreed to the transfer of plaintiff's case to this district. He noted at that

[5]Some of these depositions were quite extensive. For example, the deposition of Matthiessen took place over eight days, and its transcript exceeds 1100 pages in length.

hearing that he considered the action to be "more proper in South Dakota." Transcript of Proceedings at 5 (Jan. 9, 1987).[6]

Now before the court are three motions made by defendants Viking and Matthiessen.[7] First, defendants move for dismissal on the ground that the allegedly defamatory statements are protected opinion or merely reports of accusations.[8] Alternatively, defendants move for summary judgment on the ground that plaintiff has failed to make a showing of factual malice by clear and convincing evidence. Finally, in what was labeled a "cross motion," defendants move for dismissal on the ground that the assertion of privilege by the federal government has made a fair trial impossible. In connection with these motions, the parties have submitted an enormous volume of materials, including multiple memoranda, complete deposition transcripts, lengthy affidavits with numerous exhibits, and the book itself.

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[6]The record shows no effort by Ellison to conduct discovery or prosecute his counterclaim in this court. The deadline for discovery is now past. In view of his failure to prosecute his counterclaim here and his apparent ability to proceed with it in South Dakota state court, his federal counterclaim should be dismissed without prejudice.

[7]In view of the dismissal of the claims against defendant Ellison, "defendants" shall hereafter denote defendants Viking and Matthiessen.

Plaintiff has also filed motions which have not yet been completely resolved. On October 1, 1987, he moved to amend the pleadings, to compel discovery, and to impose sanctions. In an order dated October 28, 1987, the court granted plaintiff's unopposed motion to amend the complaint to correct the name of the corporate defendant and stayed consideration of the remaining motions pending resolution of defendants' motions. Plaintiff seeks sanctions pursuant to Fed. R. Civ. P. 26(g), 37(a)(4) and 37(b)(2) on the ground that counsel for defendants failed to comply with the court's order governing the scope of discovery at the deposition of Matthiessen. Plaintiff also wants attorney's fees and costs that would be incurred if Matthiessen were deposed again.

[8]Because the parties have presented matters outside the pleadings which the court has considered, the motion to dismiss should be treated as one for summary judgment. Fed. R. Civ. P. 12(c).

B.

On this motion for summary judgment, the facts must of course be viewed in the light most favorable to plaintiff. The book itself is at the heart of the case, and in the course of this litigation the court has read its entire 611 pages of text and notes.

Defendant Matthiessen is a well-known author of approximately 18 books and numerous magazine and newspaper articles.[9] He states that he conducted research for the book over a number of years. Many of the persons Matthiessen interviewed in connection with his research were affiliated with organizations seeking to protect or promote the interests of American Indians. Matthiessen also interviewed plaintiff and attempted to interview Evan Hultman, a former United States Attorney connected with the events described. Prior to its publication in 1983, an excerpt from the book was published in *The New York Times* in different form. In preparing the book for publication, Matthiessen provided copies of the manuscript to a number of individuals familiar with the facts described and solicited their opinions. Several persons identified potential inaccuracies in the book.[10] After this action was commenced in 1984, defendant Viking withdrew all hardcover copies from circulation; a paperback version has never been published.

Though the book's historical scope is broad, discussing

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[9]For example, Matthiessen is the author of *The Snow Leopard*, for which he received the National Book Award in 1978.

[10]For example, James Leach, an attorney with WKLDOC, criticized Matthiessen's theory that the federal government's treatment of Indians at Wounded Knee and Pine Ridge was driven by interests in mineral deposits on Indian lands. There has been no showing, however, that any of these persons identified inaccurate statements that concerned plaintiff.

the relationship between the Indian peoples and the federal government from 1835 to 1981, it largely focuses upon events related to the killing of two FBI agents on the Pine Ridge Indian Reservation on June 26, 1975. It examines conditions on the reservation and the subsequent government investigation into the killings. It also reports on the indictment, trial and conviction of Leonard Peltier, a member of the American Indian Movement (AIM), on two counts of murder. In the words of the book's dust cover, Matthiessen "presents disturbing new evidence, obtained under the Freedom of Information Act in 1980 and 1981, which suggests that Peltier may well be innocent, and argues persuasively that in any event he deserves a new—and fair—trial." Considerable space in the book is also devoted to a discussion of the occupation of Wounded Knee in 1973 and the federal government's response to it.

Prior to writing the book, Matthiessen entered into an agreement with Telos Film Corp. (Telos) and the Leonard Peltier Defense Committee (Defense Committee). Under this agreement, which is dated October 1, 1980, Telos and the Defense Committee agreed to provide Matthiessen with access to information relating to Peltier, including an exclusive interview with Peltier. In return, Matthiessen agreed to share his advances and royalties from the book, providing Telos and the Defense Committee with 40 percent of the first $100,000, and 55 percent of all subsequent proceeds. This arrangement was also set forth in Matthiessen's contract with Viking, which is dated June 8, 1981. The book does not disclose this agreement, except insofar as it acknowledges the assistance of the Defense Committee.

Plaintiff Price figures fairly prominently in the book, both in connection with the Wounded Knee trials and in

connection with events surrounding the killing of the two FBI agents. Twelve pages of the book recount in detail a telephone conversation between Price and Matthiessen, in which Price sets forth his view of many of the events described in the book. *In the Spirit of Crazy Horse* 461-72 (1983).[11] Matthiessen concludes his description of the conversation by referring to Price as "the man regarded wrongly as the villain of the tale. . . ." P. 472.

> Price alleges that statements in the book stated or suggested that [he] is a murderer; that he knowingly suborned perjury; that he violated constitutional and other rights in the performance of his duties as an FBI Special Agent; that he unlawfully harrassed [sic] American Indian Movement ("AIM") members and attempted to destroy AIM; that he is a liar; that he is corrupt; that he is vicious and violent; that he is a racist; that he willfully neglects the duties of his job; and that he was engaged in illegal and wrongful conduct.

Complaint paragraph 9. The court's December 30, 1985 order dismissed 14 of the allegedly defamatory statements from the complaint; 20 such statements remain to be addressed.[12] These statements can be loosely grouped around three events. First, a number of the allegations concern the testimony of Louis Moves Camp at the trial of Dennis Banks and Russell Means arising out of the 1973 occupation of Wounded Knee, South Dakota. *See United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974), *appeal dismissed*, 513 F.2d 1329 (8th Cir. 1975). Second, a number of the

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[11]The book shall hereafter be referred to by page number only.

[12]Many of the statements are quite lengthy; some take up an entire page of the book. *See, e.g.*, paragraphs 10a, 10b, 10f.

allegations relate to affidavits and testimony of Myrtle Poor Bear in connection with the trials of Leonard Peltier and Richard Marshall. *See United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *Marshall v. State*, 305 N.W.2d 838 (S.D. 1981). Finally, a number of the allegations center around the death of Anna Mae Aquash and the subsequent investigation into it.

On a motion for summary judgment, the movant has the burden of establishing that no genuine issue of material fact remains and that the case may be decided as a matter of law. *Meyers v. Reagan*, 776 F.2d 241, 244 (8th Cir. 1985); *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). A party opposing summary judgment is entitled to the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings and affidavits. *Kresse v. Home Insurance Co.*, 765 F.2d 753, 754 (8th Cir. 1985). However, "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2552-53 (1986); *see also Hegg v. United States*, 817 F.2d 1328, 1331 (8th Cir. 1987).

II.

The Supreme Court has provided guidance as to what types of statements may provide a cause of action for libel. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court established a constitutional distinction between fact and opinion, stating:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Id. at 339-40 (footnote omitted).

The Court of Appeals recently adopted a four-part test to determine whether a statement is fact or opinion. *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-03 (8th Cir.) (en banc), *cert. denied*, 107 S. Ct. 272 (1986) (*"Janklow II"*).[13] The first consideration is the "precision and specificity of the disputed statement;" the more precise a statement is, the more likely it is to be fact. *Id.* at 1302. The second consideration is the verifiability of the statement — "[I]f a statement cannot plausibly be verified it cannot be seen as a 'fact.' " *Id.* Third is the "literary context" factor which requires consideration of "the category of publication, its style of writing and intended audience." *Id.* at 1303. The statement is to be regarded "as part of a whole, including tone and the use of cautionary language." *Id.* at 1302.[14] The fourth consideration is the "public context factor;" that is, "the public or political arena in which the statement

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[13]In *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985) (*"Janklow I"*), a panel of the court held unanimously that the accurate reporting of a historical fact—that an Indian girl had claimed that she was raped by plaintiff—was not actionable. That holding was not considered by the en banc court. The panel majority had also ruled that any implication in the Newsweek article that plaintiff prosecuted a case out of revenge was actionable fact. *Id.* at 652. Rehearing en banc was granted "on the question whether the article should be read as fact or opinion," and the en banc majority found the challenged statement to be opinion and therefore nonactionable. 788 F.2d at 1301.

[14]Courts have almost uniformly adopted "an approach that analyzes the alleged defamation in the context of the article in which it appears along with the larger social context to which it relates." *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987).

is made and whether the statement implicates core values of the First Amendment." *Id.* at 1303. With regard to this factor, the Court of Appeals explained that "speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment." *Id.* at 1304 (footnote omitted). The Court of Appeals concluded that "these factors must be considered together, that no solitary criterion can be dispositive, and that ultimately the decision whether a statement is fact or opinion must be based on all the circumstances involved." *Id.* at 1302.

Thus, the four-part *Janklow II* test must be applied to decide that part of defendants' motion which is based on the opinion defense, and the statements must be considered "as part of a whole."

A.

The first two factors are specificity and verifiability. Because they are so closely related, they will be considered together.

Many of the alleged defamatory statements lack specificity and are unverifiable. For example, paragraph 10u reads:

> . . . Like Myrtle Poor Bear and Angie Long Visitor, like the young Navajo boys bullied into testifying against their leaders, like many others on both sides whose lives have been corrupted to ensure the victory of the United States over Leonard Peltier, this man [Price] on the other end of the wire was only another casualty of the new Indian wars, and he would be soiled for the rest of his days by deeds done in the belief that the end justified the means, whether or not he ever pays a formal penalty.

P. 472. This statement is vague and unverifiable. It is impossible to verify whether plaintiff "would be soiled for the rest of his days by deeds done in the belief that the end justified the means, whether or not he ever pays a formal penalty." Many of the other statements or portions thereof are similarly vague and unverifiable. *See, e.g.*, Paragraphs 10a ("'[T]here's a lot of aggression [in Price], there's something *mean;* he's a very complex man. Price can be very friendly when he feels like it, and he can also look you in the face and lie — and know you know he's lying — and *still* not show a damned things in his eyes.'" P. 93); 10t ("To judge from his speech, David Price is not a stupid man, but one whose intelligence is severely limited by preconceptions — either that, or he is a liar who not only believes but is angered and moved by his own lies." P. 471). That these statements are vague and unverifiable suggests that they are opinion.

Other statements about which plaintiff complains are somewhat more specific. Some suggest that plaintiff had a role in the presentation of false testimony or false affidavits. For example, paragraph 10c states:

> More serious than Louis Moves Camp's lies was the all but inescapable conclusion that Agent Price and perhaps Agent Williams had knowingly prepared this man to give false testimony; at the very least, they found his story so convenient that they had not bothered to find out if it was true.

P. 98. Other statements concerning the testimony of Louis Moves Camp are the basis of paragraphs 10a, 10b, and 10d. A number of statements concern Price's role in obtaining affidavits and testimony from Myrtle Poor Bear. Paragraph 10n contains this portion of the book, for example:

> Benson could not or would not see that the two FBI agents who had prepared her testimony in two separate cases, and who knew her well, were at least as aware as Hultman that their witness was unqualified, and that under those circumstances their exploitation of her to ensure Peltier's extradition had been a flagrant example of the misconduct on which the defense had built its case. Having decided in the first days of the investigation that Peltier was guilty (the defense declared), the FBI had constructed evidence to fit that theory, and meant to see him convicted by fair means or foul. Once Peltier had been returned to the United States, there was no point in putting that witness on the stand, where her instability might undermine the jury's confidence in the integrity of the U.S. attorneys.

P. 348. *See also* paragraphs 10d, 10o, 10q, and 10w.

It is arguable that some of these statements have the specificity and verifiability required to satisfy the first portions of the *Janklow II* test. Even if this were the case, however, it would not establish that the statements are actionable fact.[15] Instead, all four factors "must be considered together, . . . no solitary criterion can be dispositive, and . . . ultimately the decision whether a statement in fact or opinion must be based on all the circumstances involved." 788 F.2d at 1302. In *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir. 1987), Judge John Minor Wisdom, applying a similar

[15]The Court of Appeals has noted that "[w]hile allegations of specific criminal conduct generally cannot be protected as opinion, broad brush-stroked references to unethical conduct, even using terms normally understood to impute specific criminal acts, may be understood by the reasonable viewer as opinion." *Lauderback v. American Broadcasting Cos.*, 741 F.2d 193, 197 (8th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

test,[16] viewed the verifiability factor as "a minimum threshold issue." The Fourth Circuit concluded that

> a verifiable statement, a statement that has failed the second *Ollman* factor, nevertheless qualifies as an "opinion" if it is clear from *any* of the three remaining *Ollman* factors, individually or in conjunction, that a reasonable reader or listener would recognize its weakly substantiated or subjective character -- and discount it accordingly.

Id. Although the statement in question was verifiable, it was nonetheless opinion because a reasonable reader would recognize that the statement likely reflected the bias of the speaker. *Id.* at 1290.

Thus, even if some of the statements in question pass the specificity and verifiability tests, they must be closely examined with the remaining *Janklow II* factors in mind.

B.

The literary context factor requires examination of the style of writing and tone, considering the statements "as part of a whole." 788 F.2d at 1302. The book has some initial appearance of objective historical reporting. For example, the book contains an extensive bibliography and detailed footnotes for each chapter. A reading of the book, however, reveals that it has a mission of persuasion. The author advocates a new trial for Leonard Peltier. And in Matthiessen's own words, the book "argues and supports the cause of the traditional Indian people and their allies

[16]The Fourth Circuit applied the four-part test set forth in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). *Janklow II* adapted the *Ollman* standard in articulating its test. 788 F.2d at 1302.

in their long struggle with the U.S. government." P. 577; *See also* p. 460, 462.[17] Matthiessen's sympathies with AIM are evidenced throughout the book. For example, he concludes that AIM's "warrior spirit had restored identity and pride to thousands of defeated people and inspired attempts to resurrect the dying languages and culture." P. xxiv.

The book's very title suggests an identification with the Indian position and a powerful quotation from Crazy Horse is presented as a preface to the book.[18] The book is dedicated to "all who honor and defend those people who still seek to live in the wisdom of Indian way." Each chapter begins with a quotation from an Indian, most of which exalt the values of the traditional Indian way of life and deplore the interference of whites with that way of life. Much of the narration is presented in the voices of Indians.[19] The book deals with historical events, but does so from a very pointed

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[17]Even in the absence of such explicit acknowledgements, Matthiessen's sympathies would be apparent. For example, Matthiessen adopts the term "goons" that was used by some Indians on the Pine Ridge Reservation to refer to the police force organized by the tribal council president. *See, e.g.*, pp. 70, 73, 250. Matthiessen writes that "[t]he Reservation Murders investigation was concerned only with the killing of the agents; it did not concern itself with the dozens of murders committed in the past three years on the reservation, almost none of which had ever been investigated, far less solved." P. 195. The tone of such writing strongly suggests that Matthiessen identifies with the Indians critical of government policy over this time period.

[18]This quotation reads:

> We did not ask you white men to come here. The Great Spirit gave us this country as a home. You had yours. We did not interfere with you. The Great Spirit gave us plenty of land to live on, and buffalo, deer, antelope and other game. But you have come here; you are taking my land from me; you are killing off our game, so it is hard for us to live. Now, you tell us to work for a living, but the Great Spirit did not make us to work, but to live by hunting. You white men can work if you want to. We do not interfere with you, and again you say, why do you not become civilized? We do not want your civilization! We would live as our fathers did, and their fathers before them.
>
> Crazy Horse (Lakota)

[19]For example, the history of Leonard Peltier's life is told almost exclusively through quotations from Peltier. *See* pp. 41-58.

perspective.[20] The book's tone and style suggest that the statements in question are opinion.

The fact that the statements were made in a book is relevant. The *Janklow II* court emphasized that the statement in question was published in a national newsmagazine rather than in a daily newspaper. The Court noted that "magazines have a tradition of more colorful, even feisty language, than do dailies," concluding that "the magazine's generally freer style of personal expression and the article's transparently [biased] posture would signal the reader to expect a fair amount of opinion." 788 F.2d at 1304. Books provide an environment for expression far less restrictive than that of a weekly newsmagazine. In a long book which need not report current factual events, an author has the freedom to develop a thesis, conduct research in an effort to support the thesis, and publish an entirely one-sided view of people and events. A reader of such a book not only expects to find opinion but probably is in active search of opinion; a discussion of history without synthesis and analysis has little intellectual content.

This is a long and rambling book; it has more than 600 pages and is loosely organized. As is stated explicitly numerous times in the book, and as would be apparent to any reader, this book has a thesis and presents a one-sided view of people and events. Its style of writing is often more lyrical than prosaic. Its intended audience is far different from that

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[20]Though it describes actual events, the tone of the book as a whole cannot be considered "hard news" reporting. For example, the Introduction begins with poetry:

> The buffalos I, the buffalos I . . .
> I am related to the buffalos, the buffalos.
> Clear the way in a sacred manner!
> I come.
> The earth is mine.
> The earth is weeping, weeping.

of, for example, a daily newspaper. With its $20.95 price tag and its sometimes dense presentation, the book's intended audience would likely include students of American Indian history and persons with a specific interest in the events occurring in South Dakota in the 1970's. This audience is more likely to understand the book as opinion than might a broader audience.

In sum, the court finds it almost impossible "that a reader could confuse [*In the Spirit of Crazy Horse*] with purely objective, neutral, straight factual reporting. Its nature, tone and style all indicate opinion." *Saenz v. Playboy Enters., Inc.*, 653 F. Supp. 552, 566 (N.D. Ill. 1987).

C.

The *Janklow II* court stated that "speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment." 788 F.2d at 1304.[21] In finding that the public context factor favored classification as opinion in that case, the court noted that the statements were criticisms of public officials in connection with "an issue of national importance, the treatment of Indian people." *Id.* at 1305.

In the Spirit of Crazy Horse contains an enormous amount of this kind of speech, and therefore "implicates core values of the First Amendment." *Id.* at 1303. Indeed, the book contains little else; it considers the history of government policies towards and treatment of American Indians, as well as examining the conduct of government agents

[21]This view has a long heritage. *See, e.g., Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (freedom of speech is "means indispensable to the discovery and spread of political truth"); A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

involved in Wounded Knee and the reservation murders investigation. It is speech about government and about government officials. It is the "form of speech which the Framers of the Bill of Rights were most anxious to protect." *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984). This factor also counsels classification of the statements as opinion.

D.

The court has carefully considered all of the allegedly defamatory statements still remaining in the case in conjunction with the *Janklow II* factors and the record and finds that they fall into the opinion category. Many of the statements completely lack specificity and verifiability. Although some of the statements are arguably specific and verifiable, the literary and public context factors indicate that the statements must be classified as opinion. A reasonable reader would recognize the subjective character of the statements in the context of the book as a whole. As criticism of government, the statements are entitled to the maximum protection of the First Amendment. They cannot provide the basis for a defamation action.

III.

Some of the allegedly defamatory statements are actually quotations from persons accusing Price of wrongdoing or are statements that rumors existed to the effect that Price had acted wrongly. For example, paragraphs 10k and 10s state:

> A few days later, Kunstler took this matter up with Agent Price, whom some of the Indians, at least, had suspected of involvement in the killing [of Anna Mae Aquash] . . .

> Tilsen, who had dealt with Price since the time of Wounded Knee, and knows most of the Indian people Price has dealt with, had no patience with my speculations on this man's blind obedience to the System. "In my opinion, David Price is one of the most corrupt and vicious agents in the FBI . . . ."

Pp. 306, 461. Plaintiff has not disputed the accuracy of these reports; that is, that some Indians did suspect Price and that Tilsen made that statement.[22] Instead, plaintiff argues that reporting the existence of suspicions or such statements is itself actionable and that authors cannot act "as a sort of conduit for untreated sewage of raw rumor." Plaintiff's Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment at 3.

The *Janklow I* panel addressed this issue in considering an article in Newsweek magazine that reported that a rape allegation had been made against Governor Janklow at one time. The panel unanimously rejected the possibility of liability on this basis alone, stating:

> To the extent the publication of the rape allegation has caused harm to Janklow's reputation, this harm is the result of a materially accurate report of historical fact, not of an assertion by Newsweek that Janklow committed the alleged crime. Because the publication of a materially true statement is constitutionally protected, *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964), and because the article in question cannot be read to imply that Newsweek espoused the validity of the rape allegation, we find no error in the District Court's judgment for Newsweek on this claim.

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[22]Tilsen's statement itself would appear to be opinion insofar as it lacks precision and specificity and is unverifiable.

759 F.2d at 649.[23] Under *Janklow I*, the mere reporting of claims or suspicions which have concededly been published by others is not actionable.[24] Matthiessen's book does not espouse the validity of the suspicions reported. On the contrary, it states: "[D]espite occasional suggestions to the contrary in lurid articles on this case, no one I have talked to makes the serious claim that David Price killed Anna Mae Aquash; all seem to agree that, whoever was responsible for the death, it was an Indian who pulled the trigger." Pp. 445-46. With respect to the reporting of Tilsen's opinion about Price, it cannot be the case that the accurate reporting of an opinion constitutes actionable defamation when one's own statement of that opinion is not actionable.

IV.

Defendants also move for summary judgment on the ground that plaintiff has failed to make an adequate showing of "actual malice," as required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In determining the standard to be applied to libel claims brought by public officials in *New York Times*, the Supreme Court considered the issue "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well

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[23]The parties dispute the weight of *Janklow I* as precedent. Plaintiff argues that the panel decision was vacated by the en banc reconsideration and that it has no precedential value. Defendants assert that the en banc opinion reviewed a limited portion of the panel decision, noting that the en banc decision explicitly left certain of the panel findings undisturbed. 788 F.2d at 1301 n.2. Since this portion of *Janklow I* was not disturbed by the en banc court, it should remain good authority.

[24]In an earlier opinion, this court cited authority suggesting defendants could be liable for republication alone. 625 F. Supp. at 645. At that time, the status of *Janklow I* was uncertain; rehearing en banc had been granted, but the en banc court had not yet issued its opinion. *Id.* at 646 n. 10.

include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. To this end, the First Amendment requires a rule barring damages for a defamed public official "unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. This showing must be made with "convincing clarity." *Id.* at 285-86.

The Court has since amplified the evidentiary standard for actual malice. The "reckless disregard" standard means that there "must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). And the heightened evidentiary requirement applicable to proof of actual malice — that is, by clear-and-convincing evidence — must be applied in considering summary judgment motions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2514 (1986).

A.

The "actual malice" standard applies to defamation actions brought by "public officials." *New York Times*, 376 U.S. at 279. The parties disagree as to whether Price is a public official in this sense.[25] The precise question of whether an active FBI agent is a public official has not been before the Supreme Court. In *New York Times*, the Court declined "to determine how far down into the lower ranks of government employees the 'public official' designation would extend . . . ." *Id.* at 283 n.23. Public officials include "at the very least . . . those among the hierarchy of government

[25]In an earlier opinion, the court only touched on this issue. *See* 625 F. Supp. at 649.

employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (footnote omitted). A deputy sheriff has been found to meet the *Rosenblatt* test "at least where law enforcement and police functions are concerned." *St. Amant v. Thompson*, 390 U.S. 727, 730 & n.2 (1968). Subsequent cases in the lower courts have consistently found law enforcement officers to be public officials for purposes of the *New York Times* standard. *See, e.g., Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1069 (5th Cir. 1987); *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (citing cases); L. Tribe, *American Constitutional Law* § 12-12, at 636 (1978) ("[T]he term 'public official' now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen.").

First Amendment policy concerns behind the *New York Times* decision favor extending the concept of public official to include FBI agents when acting publicly in the course of their duties. The conduct of such agents in exerting their federal authority is a matter of legitimate public interest. Here, plaintiff and other FBI agents were involved in unusual events and volatile situations on Indian reservations. The public has an interest in learning about law enforcement responses to crises and emergencies and in learning about conditions on the reservations. In this sense, then, plaintiff's conduct touched on "an issue of national importance, the treatment of Indian people." *Janklow II*, 788 F.2d at 1305. Debate over governmental conduct in such circumstances should be "uninhibited, robust, and wide-open." 376 U.S. at 270. The public also has a special inter-

est in the integrity of the justice system. Under *Rosenblatt* and the circumstances of this case, the court finds that plaintiff is a public official for purposes of the *New York Times* standard.[26] He therefore has the burden of establishing actual malice by clear and convincing evidence.

B.

In an attempt to meet their burden of showing that "the defendant in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), libel plaintiffs often rely upon circumstantial evidence.[27] Plaintiff relies upon a large number of factors in his attempt to make this showing, including the seriousness of the charges, lack of sources for certain information, obvious reasons to doubt sources, willful failure to consult obvious sources, awareness of inconsistent information, inherent improbability, lack of deadline pressure, and failure to verify information following denials.[28] Plaintiff also argues that Matthiessen's agreement to share his royalties with the

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[26]All of the alleged defamatory statements concern acts of plaintiff in his law enforcement capacity or perceptions of persons he encountered in that capacity. As such, they must be considered in the context of the First Amendment's emphasis on protecting criticism of official conduct. Different considerations would be relevant if the statements had concerned private conduct.

[27]Plaintiff argues that direct evidence of subjective doubt exists in this case, relying upon statements by Matthiessen in his deposition that he did not believe all of the rumors he reported in the book. These rumors were reported as rumors, however, rather than as true statements asserted by the author himself. The existence of a rumor can be an important historical fact. Because plaintiff does not question the existence of the rumors, he is not asserting that their accurate reporting is a false statement. Such reports are not actionable as mentioned *supra* at 21-22. Matthiessen's statement of disbelief in the rumors is not evidence of actual malice where the rumors are relevant to other text.

[28]In large part, plaintiff applies the factors in the framework discussed in Bloom, *Proof of Fault in Media Defamation Litigation*, 38 Vand. L. Rev. 247 (1985).

Leonard Peltier Defense Committee gave him a motive to publish falsehoods which is relevant to a determination of actual malice. Finally, plaintiff asserts that "collateral falsehoods" — false statements of fact unrelated to plaintiff — are probative of the author's reckless state of mind with respect to statements about him.

The record indicates that Matthiessen took considerable care in writing the book. He circulated his manuscript among knowledgeable persons, solicited their criticisms, and made corrections where he considered it appropriate. He recognized that several of his sources of information might reflect a pro-Indian, anti-government bias and sought out other viewpoints. He interviewed plaintiff, and devoted twelve pages of the book to that interview, in which Price expresses his view on many of the events in question. Pp. 461-72. He attempted to interview former United States Attorney Evan Hultman, but Hultman refused. Pp. 497-98. Viewed in the light most favorable to plaintiff, however, the facts may suggest that Matthiessen was careless in writing certain portions. The quality of the book could well have been improved by an additional editing. Negligence, however, "is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *New York Times*, 376 U.S. at 288; *see also Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987) ("[a] negligent failure to investigate does not itself establish recklessness for purposes of a libel suit.").

Plaintiff places great emphasis on Matthiessen's agreement with the Defense Committee. But the discovery of this agreement does no more than reinforce the already apparent one-sidedness of the book. The book argues for a new trial for Leonard Peltier. Like a legal brief or a political tract,

it is not a neutral descripition of events. Matthiessen's affiliation with the Defense Committee does not make it more likely that he had serious doubts as to the truth of his publication. In fact, his willingness to donate a portion of the book's royalties could evidence his sincere belief in the cause he promoted and the words he wrote, but on this motion the court will not draw such an inference. That the book is one-sided does not show actual malice: "The deliberate choice of [one of a number of possible rational interpretations] . . . [is] not enough to create a jury issue of 'malice' under *New York Times*." *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971).

The court finds little or no support for plaintiff's argument that "collateral falsehoods" may provide a basis for inferring actual malice. As the District of Columbia Circuit recently held "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir.) (en banc) (emphasis in original), *cert. denied*, 108 S. Ct. 200 (1987). Accordingly, even if Matthiessen had subjective doubts about, for example, the mineral deposit conspiracy theory, this would not establish an inference of actual malice with respect to his statements concerning plaintiff. The doubt must be in conjunction with the alleged defamatory statement.

Finally, even a superficial investigation reveals that some of the allegedly defamatory statements are not false. For example, paragraph 10w reads:

> . . . And since Marshall's continuing appeal is essentially based on FBI misconduct involving the same witness [Myrtle Poor Bear] whose false affidavits ensured Leonard Peltier's extradition from Canada, the

outcome of his case is bound to affect Peltier's own chance for a new trial.

P. 476. In *United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979), the Court of Appeals noted that "[t]he use of the affidavits of Myrtle Poor Bear in the extradition proceedings [of Peltier] was, to say the least, a clear abuse of the investigative process by the F.B.I. This was conceded by government counsel on the hearing in this court." *Id.* at 335 n.18. Substantial portions of paragraph 10d and other statements concerning Myrtle Poor Bear find support in former Chief Justice Wollman's dissent in *Marshall v. State*, 305 N.W.2d 838, 843 (S.D. 1981). Actual malice requires both that the defamatory publication be false and that its author entertained serious doubts as to its truth. *See Tavoulareas v. Piro*, 817 F.2d at 775-76. To the extent that the statements were not false, there can be no actual malice.

After considering all of the evidence presented by plaintiff with respect to defendants Matthiessen and Viking, the court finds that it "is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2513 (1986). As such, no genuine issue of material fact remains, and defendants are entitled to summary judgment.[29] *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986).

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[29]Plaintiff asserts that the court cannot grant summary judgment for defendants at this time, arguing that he is entitled to "a full opportunity to conduct discovery," *Anderson*, 106 S. Ct. at 2514, and that discovery has not yet been completed. Discovery was conducted over a period in excess of one year, however, and plaintiff opposed defendants' September 9, 1987 motion to extend the discovery deadline. Plaintiff has had a full opportunity to conduct discovery as required by *Anderson*, and summary judgment at this time is appropriate under all the circumstances.

Because the complaint should be dismissed, plaintiff's motions to compel discovery and for sanctions covering the costs of further discovery are moot.

V.

Defendants also seek dismissal on an additional basis in their so-called "*Fitzgerald*" motion. Defendants made this "cross motion" in response to the federal government's motion for a protective order with respect to the deposition of plaintiff. United States Magistrate Floyd E. Boline granted the government's motion on November 21, 1986 and issued an order prohibiting plaintiff from disclosing the identity of any FBI informant under the common law informer's privilege and preventing inquiry into grand jury proceedings pursuant to Fed. R. Crim. P. 6(e). Relying almost exclusively upon *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985), defendants argue that the magistrate's order prevents them from having a fair opportunity to defend plaintiff's claim and therefore requires dismissal of the action.[30]

Fitzgerald involved an article published in Penthouse Magazine which asserted that a scientist, who did work with dolphins for the CIA and the Navy for military and intelligence purposes, sold "dolphin torpedoes" to other countries. Plaintiff scientist alleged that the article libelously charged him with espionage. When plaintiff identified a Navy employee who would testify that he had not disclosed any classified information, the Navy intervened in the case and moved to dismiss on the ground that the trial would lead

[30]Defendants argue that the complaint focuses on allegations that plaintiff failed to investigate fully various matters, such as the identity of Anna Mae Aquash's body, the truth of Louis Move Camp's testimony, and the truth of Myrtle Poor Bear's affidavits. In order to establish the truth of these assertions as their defense, defendants contend that they must know whether plaintiff questioned all persons with relevant information, including FBI informants. Because the Magistrate's order prohibits defendants from discovering the identity of FBI informants from Price, defendants argue that plaintiff's claims cannot be fairly litigated.

to the disclosure of privileged state secrets. Finding that "the very subject of this litigation is itself a state secret," and that "no amount of effort and care on the part of the court and the parties will safeguard [the] privileged material," the court affirmed the dismissal of the action. 776 F.2d at 1243, 1244.[31]

The court is not persuaded, however, that *Fitzgerald* should lead to dismissal of this action. First, it is not at all clear that the holding extends beyond contexts involving military or state secrets privileges to encompass other privileges. Second, the *Fitzgerald* court carefully limited its holding to situations in which "the very subject of [the] litigation is itself" privileged. 776 F.2d at 1243. Here, by contrast, the information sought by defendants would be helpful, but is not itself the subject of the litigation. In addition, *Fitzgerald* stressed that dismissal should only be a last resort. *Id.* at 1243-44. Defendants have not shown here that they have been denied discovery necessary for the fair litigation of the claims against them. Finally, defendants' Fourth Circuit precedent may be distinguished on the ground that the government intervened as a party in *Fitzgerald* and served as counsel for defendant in *Farnsworth Cannon*. The government has taken no such role in this litigation. For these reasons, this basis for dismissal should be denied.

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[31]The *Fitzgerald* court relied, in part, upon an earlier Fourth Circuit decision, *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 281 (4th Cir. 1980) (en banc). In that case, the court upheld the dismissal of a tortious interference claim against a Navy employee, finding that "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation." *Id.*

VI.

This litigation has gone on a long time. Plaintiff has had ample opportunity for discovery and to establish an actionable case, but defendants have shown they are now entitled to summary judgment. Plaintiff appears from time to time in this court as a dedicated public servant and is understandably distressed by portions of *In the Spirit of Crazy Horse.* But it is not for this court to balance his distress with the right to freedom of speech vigorously asserted by defendants. The Supreme Court has already struck that balance with respect to public officials, and in the absence of clear and convincing evidence of actual malice with respect to a statement of fact concerning plaintiff, the balance tips in favor of free speech. For all the reasons previously discussed, this action should be dismissed.